No. 17-647	
Title:	**Rose Mary Knick, Petitioner** **v.** **Township of Scott, Pennsylvania, et al.**
Docketed:	November 2, 2017
Linked with 17A272	
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Numbers:	(16-3587)
Decision Date:	July 6, 2017
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Sep 07 2017	Application (17A272) to extend the time to file a petition for a writ of certiorari from October 4, 2017 to November 1, 2017, submitted to Justice Alito.
Sep 11 2017	Application (17A272) granted by Justice Alito extending the time to file until November 1, 2017.
Oct 31 2017	Petition for a writ of certiorari filed. (Response due December 4, 2017)
Nov 13 2017	Blanket Consent filed by Petitioner, Rose Mary Knick.
Nov 29 2017	Blanket Consent filed by Respondent, Township of Scott, PA. **Blanket Consent**
Nov 29 2017	Motion to extend the time to file a response from December 4, 2017 to January 3, 2018, submitted to The Clerk. **Main Document**
Dec 04 2017	Motion to extend the time to file a response is granted and the time is extended to and including January 3, 2018
Dec 04 2017	Brief amicus curiae of National Association of Home Builders filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 04 2017	Brief amici curiae of Cato Institute, et al. filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Dec 04 2017	Brief amicus curiae of Institute for Justice filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jan 03 2018	Brief of respondent Township of Scott, Pennsylvania in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 12 2018	Reply of petitioner Rose Mary Knick filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 17 2018	DISTRIBUTED for Conference of 2/16/2018.
Feb 20 2018	DISTRIBUTED for Conference of 2/23/2018.
Feb 26 2018	DISTRIBUTED for Conference of 3/2/2018.
Mar 05 2018	Petition GRANTED limited to Question 1 presented by the petition.
Mar 08 2018	Joint Motion for an extension of time filed. **Main Document**
Mar 09 2018	Joint Motion to extend the time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 21, 2018. The time to file respondents' brief on the merits is extended to and including July 20, 2018.
Apr 30 2018	Blanket Consent filed by Petitioner, Rose Mary Knick **Blanket Consent**
May 02 2018	Blanket Consent filed by Respondent, Township of Scott, Pennsylvania **Blanket Consent**
May 11 2018	Brief amicus curiae of Western Manufactured Housing Communities Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 17 2018	Joint motion for a further extension of time filed. **Main Document**
May 21 2018	Joint motion for a further extension of time granted. The time to file the joint appendix and petitioner's brief on the merits is further extended to and including May 29, 2018. The time to file respondents' brief on the merits is further extended to and including July 30, 2018.

May 29 2018	Brief of petitioner Rose Mary Knick filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 29 2018	Joint appendix filed (to be reprinted).
May 29 2018	Joint appendix filed (6/4/18 reprint received). (Statement of costs filed.) **Main Document** **Proof of Service**
May 31 2018	Brief amicus curiae of American Planning Association in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 01 2018	Brief amici curiae of American Farm Bureau Federation, National Cattlemen's Beef Association and CATL Fund filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 01 2018	Brief amici curiae of Washington Legal Foundation, et al filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 04 2018	Brief amicus curiae of Justice and Freedom Fund filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 04 2018	Brief amicus curiae of Center for Constitutional Jurisprudence filed. **Proof of Service** **Main Document** **Certificate of Word Count**
Jun 04 2018	Brief amicus curiae of Ohio Farm Bureau Federation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 04 2018	Brief amicus curiae of Institute for Justice filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jun 05 2018	Brief amici curiae of AARP and AARP Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 05 2018	Brief amici curiae of Congressmen King, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 05 2018	Brief amicus curiae of National Association of Home Builders filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 05 2018	Brief amici curiae of The States of Texas and Oklahoma filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 05 2018	Brief amici curiae of Citizens' Alliance for Property Rights Legal Fund and Inversecondemnation.com filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Jun 05 2018	Brief amicus curiae of New England Legal Foundation filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jun 05 2018	Brief amici curiae of San Remo Hotel, L.P., et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 05 2018	Brief amicus curiae of The Becket Fund for Religious Liberty filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 05 2018	Brief amici curiae of Cato Institute, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jun 05 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Jul 09 2018	SET FOR ARGUMENT On Wednesday, October 3, 2018
Jul 30 2018	Brief of respondent Township of Scott, Pennsylvania filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 31 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Aug 02 2018	Brief amicus curiae of Cemetery Law Scholars filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 03 2018	CIRCULATED
Aug 06 2018	Brief amici curiae of Takings and Federal Courts Scholars filed. (Distributed) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Aug 06 2018	Brief amici curiae of National Governors Association, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 06 2018	Brief amici curiae of States of California, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 07 2018	Record requested from the U.S.C.A. 3rd Circuit.
Aug 20 2018	Record received from both the U.S.C.A. 3rd Circuit, and from the U.S.D.C. Middle District of Pennsylvania (Scranton) is electronic.

Aug 24 2018	Reply of petitioner Rose Mary Knick filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 24 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 03 2018	Argued. For petitioner: J. David Breemer, Sacramento, Cal.; and Noel J. Francisco, Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Teresa Ficken Sachs, Philadelphia, Pa.
Nov 02 2018	This case is restored to the calendar for reargument. The parties and the Solicitor General are directed to file letter briefs, not to exceed 10 pages, addressing petitioner's alternative argument for vacatur, discussed at pages 12-15 and 40-42 of the transcript of oral argument and in footnote 14 of petitioner's brief on the merits. The briefs are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, November 30, 2018. Reply briefs, not to exceed 4 pages, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 21, 2018.
Nov 28 2018	SET FOR REARGUMENT ON Wednesday, January 16, 2019
Nov 30 2018	CIRCULATED
Nov 30 2018	Supplemental letter brief of petitioner Rose Mary Knick filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 30 2018	Supplemental letter brief of United States as amicus curiae filed. (Distributed) **Main Document** **Certificate of Word Count**
Nov 30 2018	Supplemental letter brief of respondents Township of Scott, Pennsylvania, et al. filed. (Distributed) **Main Document** **Proof of Service** **Other**
Dec 06 2018	Supplemental Brief of Rose Mary Knick submitted. **Main Document** **Certificate of Word Count** **Proof of Service**

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RECORD
AND
BRIEFS

17-647

No. ________

FILED
OCT 31 2017
OFFICE OF THE CLERK
[illegible]

In The
Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO,
Individually and in his Official Capacity as Scott
Township Code Enforcement Officer,
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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Law Library

QUESTIONS PRESENTED

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court? *See Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

Alternately, whether *Williamson County*'s ripeness doctrine bars review of takings claims asserting that a law causes an unconstitutional taking on its face, as the Sixth, Ninth, Tenth and now Third Circuits hold, or whether facial claims are exempt from *Williamson County*, as the First, Fourth, and Seventh Circuits hold?

LIST OF ALL PARTIES

The party to the judgment from which review is sought is Petitioner Rose Mary Knick. She was a party in all proceedings below.

Respondent is the Township of Scott, Pennsylvania.[1]

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[1] The case also originally named Carl S. Ferraro, Individually and in his Official Capacity as Scott Township Code Enforcement Officer. However, the district court dismissed this defendant and that judgment was not appealed.

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PETITION FOR A WRIT OF CERTIORARI

Rose Mary Knick respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals is reported at *Knick v. Township of Scott, Pa.*, 862 F.3d 310 (3d Cir. 2017), and is attached here as Appendix (App.) A. The opinion of the district court is unpublished. It is attached here as App. B.[1]

JURISDICTION

This lower court had jurisdiction over this case under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution. The Court of Appeals for the Third Circuit entered final judgment on July 6, 2017. App. C. This Court granted an extension to file the Petition for Certiorari to and including Nov. 1, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTITIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

---

[1] The district court issued a prior decision dealing with claims not at issue here. It is available at *Knick v. Scott Township*, No. 3:14-cv-2223, 2015 WL 6560647 (M.D. Pa. Oct. 29, 2015).

INTRODUCTION

This case raises important questions relating to the viability and reach of the highly criticized principle, arising from *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), that property owners must unsuccessfully seek compensation in state court before suing for an unconstitutional taking in federal court.

Due to its dysfunctional impact and questionable foundation, individual Justices of this Court have strongly questioned the propriety of the "state litigation" doctrine, and argued that it should be reconsidered. *See Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring in judgment). The desire to reconsider the case is well warranted. *Williamson County* has caused more injustice and conflict in federal takings litigation than any other takings principle. Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2013 Cato Sup. Ct. Rev. 245, 247 (*Williamson County* introduced "distortions and doctrinal anomalies up and down the length of takings law"). Through its interaction with claim and issue preclusion and removal jurisdiction, the state litigation ripeness rule deprives property owners of reasonable judicial access for a takings claim, impedes the orderly development of takings law, and causes a tremendous waste of judicial and litigant resources. *Wayside Church v. Van Buren County*, 847 F.3d 812, 825 (6th Cir. 2017)

(Kethledge, J., dissenting) ("[I]f anyone has undermined the adjudication of federal takings claims against states and local governments, it is the federal courts—by the application of *Williamson County*.").

Moreover, *Williamson County*'s state litigation rule is flawed at the foundation. The decision suggests an alleged taking is not complete until it is "without just compensation," a relatively unremarkable concept. But it goes on to conclude that a lack of compensation is not apparent until a state *court* confirms it. It is wrong and unprecedented to make the absence of compensation depend on what a state court does, rather than what the executive or legislative agency responsible for the taking does. *Horne v. Dep't of Agric.*, 569 U.S. 513, 133 S. Ct. 2053, 2062 n.6 (2013) ("A 'Case' or 'Controversy' exists once the government has taken private property without paying for it."); *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) ("[A] concrete takings injury can occur without state litigation.").

Despite its practical and doctrinal flaws, federal courts have been forced to grapple with *Williamson County*'s state litigation rule for many years. In so doing, they have come into conflict on the application of the rule in several contexts. Most importantly, the courts are in stark and broad conflict on whether the state litigation rule applies to "facial" takings claims. This common type of takings claim asserts that a taking arises from the plain and express terms of a law, rather than through application of the law to specific properties and facts. At least three circuits have held that *Williamson County* does not apply to such facial claims. But, in this case, the Third Circuit adopted a contrary conclusion, in conflict with circuits holding that facial claims are not subject to *Williamson County*. App. A at 21-28. The decision also conflicts with this Court's precedent.

It is imperative that the Court reconsider *Williamson County*. This case presents a clean vehicle for doing so. The Township passed and implemented an ordinance that mandates public access to Ms. Knick's rural land, App. A at 3-4, a burden that abridges her fundamental right to exclude others and which violates this Court's physical takings precedent. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987). The challenged law includes no promise of compensation or mechanism for promptly providing it. Ms. Knick accordingly challenged the constitutionality of the ordinance in state court, but was turned away on procedural grounds. So she came to federal court. The Third Circuit recognized the serious and concrete nature of Ms. Knick's claims. App. A at 3. Yet, it held that, under *Williamson County*, federal courts cannot decide the straightforward issue of whether the ordinance unconstitutionally invades private property unless Ms. Knick goes through further state court procedures. *Id.*

The Court should review this case to decide whether *Williamson County* correctly directs takings claimants to exhaust state court remedies to ripen takings review or to resolve the conflict among the courts on whether *Williamson County* applies to facial takings claims.

STATEMENT OF THE CASE

This case arises from a dispute in rural, western Pennsylvania over an ordinance mandating public and governmental access to private property containing burial grounds. Pennsylvania has never had a state law prohibiting so-called "backyard burials," the practice of burying the deceased on private property. *See* Patricia E. Salkin, *Zoning and Land Use Planning*, 39 Real Est. L.J. 526, 530 (Spring 2011). As a result, it is common to find private, family gravesites in the state. *See id.*; *see also* Craig Smith, *Home burial on legislators' radar*, TribLive, Apr. 5, 2014, http://triblive.com/state/pennsylvania/5788717-74/burial-funeral-property (noting "[t]he practice of tending to one's dead is not new, as evidenced by the number of centuries-old burial sites with time-worn tombstones on private properties throughout Western Pennsylvania"). As counsel for Respondent Scott Township explained below, the Township itself "goes back several hundred years in terms of families and burial plots. So while these may not be . . . sprawling cemeteries, you will have small plots that families have maintained for years." District Court Hearing Transcript at 5:3-6.

A. Factual Background

1. Ms. Knick's Property

Ms. Knick and her family have owned 90 acres of land in the Township since 1970. App. B at 2. The parcel is located at 49 Country Club Road, Scott Township, Pennsylvania. It is bisected by a road, and delineated on all sides by stonewalls, fences, and other markers. Signs stating "No Trespassing" exist at regular intervals on the boundary. *Id.*

Ms. Knick lives on the property in a single-family residence. *Id.* She uses much of the surrounding land as a grazing area for horses and other animals. *Id.* There is no public cemetery or public access easement on the land. Ms. Knick has never authorized the public to cross or otherwise use her land.

2. The Challenged Cemetery Access Ordinance

In September, 2008, in apparent response to a public inquiry, Scott Township officials discussed an alleged ancient burial ground on Ms. Knick's property. App. B. at 3. In 2008 and early 2009, Ms. Knick informed the Township that her title does not identify a burial ground. After additional research, she informed the Township that there is no official state registration or documentation of a cemetery. Knick also declared that she was not aware of any physical sign of a burial ground. *Id.*

In December of 2012, the Township enacted a first-of-its-kind law dealing with private cemeteries, Ordinance 12-12-20-001. App. A at 3. The Ordinance purports to regulate the existence, operation, and maintenance of cemeteries. *Id.* at 3-4.

Two of its provisions are relevant here. First, Section 5 requires that "[a]ll cemeteries . . . shall be kept open and accessible to the general public during daylight hours." App. A at 3. A "cemetery" is defined as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." Ordinance 12-12-20-001 § 1(c) (Dec. 20, 2012). The Ordinance's provisions pertain to "[a]ll cemeteries, whether private or public, and whether existing or established prior to the . . . Ordinance." *Id.* § 2.

At a district court hearing, the Township explained that the Ordinance's public access provision imposes a right-of-way into private land from the nearest public road. Transcript at 17:6-9. It also confirmed that this right of access is for the general public, and that anyone can use it, whether local or not. Transcript at 18:11-17 (the provision "does not limit who specifically should be permitted on to that property").

A different provision of the Ordinance authorizes the Township's "code enforcement" agents to "enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery . . . ." App. A at 4 (quoting Ordinance 12-12-20-001 § 6).

The subject Ordinance authorizes fines of $300-$600 for every violation of its provisions, plus all court costs, including attorney fees. Each day that a violation exists is deemed a separate offense. App. A at 4.

3. Enforcement of the Ordinance Against Ms. Knick

On April 10, 2013, after enactment of the Ordinance, the Township's Code Enforcement Officer entered Ms. Knick's land without her consent. *Id.* One day later, the Township issued a Notice of Violation decreeing that the inspection of her land identified "[m]ultiple grave markers/tombstones" on the property. JA at 267. The Notice described the problem as "stones located on your property" and declared that the alleged area constituted a "cemetery" subject to the Ordinance. *Id.*

The Notice ultimately stated that Ms. Knick was "in violation of section #5 of the ordinance which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours," and directed her "to make access to the cemetery available to the public during daylight hours" as required by the ordinance. App. B at 3-4, JA at 267-68. On October 31, 2014, the Township issued a second, almost identical Notice of Violation. App. A at 5. It too commanded Ms. Knick to "make access to the cemetery available to the public."

B. State Court Procedure

On May 7, 2013, after the Township issued the first Notice of Violation, Ms. Knick filed a Complaint in the Pennsylvania Court of Common Pleas seeking Declaratory and Injunctive Relief from the Ordinance. App. A at 4. This state court complaint raised state constitutional challenges, including a takings claim. The Township then agreed to withdraw its April 11, 2013, Notice of Violation and to stay enforcement of the Ordinance.

The state court subsequently refused to rule on Ms. Knick's claims, finding they would "not [be] in the proper posture" for a decision until the Township filed a civil enforcement action against Ms. Knick. App. A at 4-5

C. District Court Procedure

At this point, Ms. Knick turned to the federal district court. App. A at 5. She filed a complaint alleging that the Ordinance violated the Fourth Amendment and the Takings Clause of the Fifth

Amendment, as enforced through 42 U.S.C. § 1983. *Id.* The claims sought equitable relief and damages. *Id.* at 6.

On October 28, 2015, the district court granted the Township's motion to dismiss the claims in an unpublished decision. *Id.* However, the district court granted Ms. Knick leave to re-plead some of her claims, including the takings claims, with more specificity.

Ms. Knick then filed a Second Amended Complaint. *Id.* That complaint made clear that her federal takings claims consisted of facial and as-applied claims against the Ordinance's access provisions.

On September 7, 2016, the district court issued an order dismissing all of Ms. Knick's re-pled takings claims. App. B at 11-18. The Court held that the claims were unripe under *Williamson County* until Ms. Knick prosecuted a new "inverse condemnation" action in state court. *Id.* Ms. Knick timely appealed to the Third Circuit.

D. The Third Circuit Decision

At the Third Circuit, Ms. Knick argued that the district erred in dismissing her facial Fourth Amendment claims and in dismissing her facial and as-applied federal takings claims. Only the latter claims are at issue here.

In a published decision, the Third Circuit upheld the lower court's dismissal of Ms. Knick's physical takings claims for lack of ripeness under *Williamson County*. In considering the facial claim, the Third Circuit reviewed and interpreted this Court's precedent. App. A at 22-25. It concluded that this

Court's decisions allow immediate federal review of a facial claim (i.e., without state litigation) only if it asserts the now-defunct theory that a regulation "fails to substantially advance a legitimate state interest." *Id.* at 24-25. It reasoned that this was because such a claim does not invoke the principle of "just compensation." *Id.*

Building on this understanding, the Third Circuit concluded that *Williamson County* is inapplicable when a claim invokes the Public Use Clause of the Fifth Amendment or the Due Process Clause. App. A at 26 (if "the plaintiff challenges the underlying validity of the taking, perhaps for lacking a public purpose or for violating due process, then the denial of compensation is irrelevant to the existence of a ripe claim and *Williamson County*'s second prong is inapplicable."). But, the lower court ruled, basic physical and regulatory takings claims are not excepted from *Williamson County*'s state litigation requirement because they implicate the "Just Compensation Clause." *Id.* at 24, 26-27. The court accordingly affirmed a prior Third Circuit decision holding that a facial taking claim alleging a denial of all economic use of property was subject to *Williamson County*'s state court procedures ripeness doctrine. *Id.* at 24-25 (affirming *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159 (3d Cir. 2006)). It ultimately held that Ms. Knick's facial takings claims challenging the ordinance as a physical occupation of property are subject to *Williamson County*, and unripe until Knick prosecutes a (second) state court lawsuit. App. A at 27-28.

As to Ms. Knick's as-applied takings claims, the Third Circuit held that these claims were also unripe under *Williamson County* until Ms. Knick filed and finished a state court inverse condemnation action. *Id.* at 28-32. Although the lower court concluded that it had authority, under this Court's precedent, to waive the state litigation ripeness requirement for prudential reasons, it declined to do so for Ms. Knick. *Id.*

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision raises an important question as to whether the Court should reconsider and overrule *Williamson County*'s state litigation ripeness doctrine. *Arrigoni*, 136 S. Ct. 1409 (Thomas, J., dissenting from denial of certiorari). The decision also highlights and exacerbates a conflict among the circuit courts on whether typical facial takings claims—claims alleging that a law destroys the economic use of property or causes a physical invasion—are ripe without exhaustion of state court procedures.

While the Third Circuit decision applying *Williamson County*'s state litigation rule to facial physical and regulatory takings claims is consistent with the decisions of the Sixth, Ninth, and Tenth Circuits, it conflicts with decisions from the First, Fourth, and Seventh Circuits. Because of *Williamson County*'s preclusive effect on judicial review, *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari), the conflict on facial claims dramatically impacts the ability of property owners to challenge restrictive laws on a facial basis.

Finally, the Third Circuit's treatment of facial takings claims is also inconsistent with this Court's precedent. That precedent has repeatedly indicated that facial takings claims are ripe upon enactment of the challenged law, without respect to state court procedures. *See, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). The decision below holds to the contrary. For all these reasons, the Court should grant the Petition.

I.

THE DECISION BELOW RAISES THE IMPORTANT QUESTION OF WHETHER THE COURT SHOULD RECONSIDER *WILLIAMSON COUNTY'S* STATE LITIGATION RIPENESS REQUIREMENT

The Court has identified a number of tests for determining when the government causes a taking of property without just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-42 (2005). Unfortunately, *Williamson County*'s demand for a state court lawsuit prior to the assertion of a federal takings claim takes much of the bite out of this Court's tests by destroying claims at an early stage. *San Remo Hotel*, 545 U.S. at 352 (Rehnquist. C.J., concurring); *Del-Prairie Stock Farm*, 572 F. Supp. 2d at 1032 (The state litigation doctrine "has led to a number of serious problems."). To add insult to injury, it is now clear that the state litigation rule underlying this regressive system lacks any compelling doctrinal justification. *Arrigoni*, 136 S. Ct. at 1409-10 (Thomas, J., dissenting from denial of certiorari). The Court should take this case to reconsider, and overrule, *Williamson County*'s state litigation ripeness principle.

A. Relevant Legal Background

1. Takings Standards

This Court has held that a person may challenge governmental action as an unconstitutional taking of private property on several different grounds. *Lingle*, 544 U.S. at 538-42. Most simply, one may assert that the government causes a *per se* taking by authorizing a "physical invasion" of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982). One may also challenge land use and other regulations as a "regulatory taking" on the basis that they harm the use and value of private property. There are two theories for doing so. First, one may allege that a regulation deprives property of "all economically beneficial use." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Second, under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), a property owner may contend that a regulation that does not deny all economic use of property still causes a taking due to its overall, adverse economic impact. *Id.* at 124. Finally, a special unconstitutional conditions-related test allows a land use applicant to challenge development permit conditions on the basis that there is no reasonable relationship between the condition and development. *Nollan*, 483 U.S. at 831-32; *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

Prior to 2005, this Court recognized an additional takings test. Specifically, a property owner could establish a taking by showing that a regulation "fails to substantially advance a legitimate state interest[s]." *Lingle*, 544 U.S. at 540-44. However, in 2005, the *Lingle* decision abrogated this test. *Id.* at 545.

that facial takings claims are ripe upon enactment of the challenged law, without respect to state court procedures. *See, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). The decision below holds to the contrary. For all these reasons, the Court should grant the Petition.

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Takings claimants generally may raise a claim under any existing test on a facial or "as-applied" basis. In a facial challenge, the plaintiff alleges that simple "enactment of a [law] constitutes a taking." *Keystone*, 480 U.S. at 494. Such a claim does not depend on the particular nature of the claimant's property or other fact-specific circumstances; the focus is on the text of the law. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296-97 (1981). Conversely, in an as-applied challenge, the claimant asserts that the law results in a taking as applied to a particular set of facts. *Id.*

2. *Williamson County*

In *Williamson County*, this Court considered a claim that land use regulations resulted in a denial of valuable economic use, as applied to the property at issue. 473 U.S. at 186-90. The Court initially held that the claim was unripe because the local government had not reached a "final decision" on application of the subject regulations to the plaintiff's property. *Id.* at 192-94.

Although this final decision ruling should have ended the case, the *Williamson County* Court went on in dicta to articulate and apply a second ripeness hurdle. Specifically, the Court stated that a takings claim will not ripen until the claimant unsuccessfully "seek[s] compensation through the procedures the State has provided for doing so." *Id.* at 194. The *Williamson County* Court reasoned that the Fifth Amendment is violated only when a takings occurs "without just compensation." *Id.* at 194-96. From there, the Court concluded that a property owner must seek and be denied compensation in state court before a federal takings claim accrues. *Id.* The Court ultimately held that the claim in *Williamson County* was not ripe because the plaintiff had not filed a state court action seeking compensation under Tennessee's inverse condemnation statute. *Id.*

Since *Williamson County*, the Court has clarified that the "state litigation" ripeness doctrine is a prudential and not jurisdictional principle. *Suitum*, 520 U.S. at 733-34.

B. The Only Function of the State Litigation Rule Is To Confuse, Delay, and Destroy Takings Claims

Although *Williamson County* presented the "state litigation" requirement as a temporary hurdle to review of takings claims in federal court, 473 U.S. at 185, it has operated as a permanent barrier. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 (6th Cir. 2004) ("The barring of the federal courthouse door to takings litigants seems an unanticipated effect of *Williamson County* . . . .). Indeed, in practice, the rule often forecloses both federal and state court review. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

1. Preclusion Rules Bar Federal Review of *Williamson County*-Ripened Takings Claims and Limits Takings Suits to State Court

The most well-known problem associated with *Williamson County* arises from the tension between the state court litigation ripeness rule and the Full Faith and Credit statute.[2] The statute "obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984). While *Williamson County* says that takings claims ripen for federal review after state court litigation, the Full Faith and Credit statute bars federal courts from hearing a case after a related state court suit. *San Remo*, 545 U.S. at 336 & n.16.

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[2] 28 U.S.C. § 1738.

Accordingly, when a plaintiff unsuccessfully litigates for compensation in state court to comply with *Williamson*, any takings claim ripened by this process is impermissible in federal court because of preclusion barriers. *See San Remo*, 545 U.S. at 346-47. *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of cert.); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 102 (2000) ("[T]he very act of ripening a case also ends it."). As the Sixth Circuit explained:

> The availability of federal courts to hear federal constitutional takings claims has often seemed illusory, because under *Williamson County* takings plaintiffs must first file in state court . . . before filing a federal claim, and because in deciding that federal claim, preclusive effect must be given to that prior state-court action under [Section 1738] according to the res judicata law of the state, including the doctrines of

> merger and bar whereby all claims which could have been brought in an earlier cause of action are precluded.

DLX, Inc., 381 F.3d at 519-20 (footnote omitted).

In *San Remo Hotel*, this Court refused to correct this situation by creating an exception from federal preclusion rules for takings cases ripened in state court under *Williamson County*. As a result, far from maturing takings claims for federal review, the state litigation doctrine works to totally deprive federal courts of jurisdiction over the Takings Clause. 545 U.S. at 349-52 (Rehnquist, C.J., concurring). It strips property owners of their ability (exercised for the previous century) to protect their property in federal court under Section 1983 and prevents federal courts from participating in the review and development of Fifth Amendment takings law. *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of cert.) (after *San Remo*, the state litigation rule "dooms plaintiffs' efforts to obtain federal review of a federal constitutional claim"). This cannot be reconciled with Congressional intent to provide citizens with a federal forum for federal civil rights violations. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (Congress "intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law."); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of [42 U.S.C.] § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . .").

Indeed, this Court has considered the availability of a federal forum to be so important that it has long allowed constitutional plaintiffs to invoke federal protection regardless of state remedies. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). Only takings plaintiffs are different, thanks to *Williamson County*. In creating a state court exhaustion barrier to federal review of takings claims, *Williamson County* radically departs from core premises of the modern judicial system. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 726 (Feb. 2008) (*Williamson County* represents "a marked change from past practice.").

2. *Williamson County*'s Interaction with Removal Often Prevents State Court Review

Despite all this, one might think that *Williamson County* at least leaves takings plaintiffs with a state court avenue for their claims. *San Remo Hotel*, 545 U.S. at 346; Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. Chi. L. Rev. 553, 605 (2012) ("State courts thus get first bite at these [takings] actions under *Williamson County*—and they get the only bite under *San Remo*."). But the state court option is often also illusory due to another problem with the state litigation ripeness doctrine: its conflict with the principle that a government defendant may remove certain cases from state court to federal court. *See* 28 U.S.C. § 1441; *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

Given that *Williamson County* frustrates initial federal court review and creates a preclusion bar to post-state court review, plaintiffs generally must file their federal takings claim in state court or not at all.

Rockstead v. City of Crystal Lake, 486 F.3d 963, 968 (7th Cir. 2007). But doing so subjects the entire complaint to prompt removal to the federal court on the basis that it raises a "federal question." *See, e.g., Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013). Removal prevents state court litigation, and renders the removed claim unripe in the new federal forum under *Williamson County*. Thus, a federal court facing a removed takings claim will typically dismiss the claim because state procedures were not exhausted. *Id.*; *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (approving of the dismissal of a removed takings claim for lack of finished state court procedures).

The combined effect of these "anomalies" is to leave many federal takings plaintiffs without any access to the courts. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari). They can't go to federal court due to *Williamson County* and many cannot go through state court due to the removal/ripeness game. Ultimately, plaintiffs may have to choose to forego their constitutional rights under the Takings Clause—in order to secure prompt review in some court under a non-takings theory—or try and brave the unpredictable and draining *Williamson County* maze.

What a mess. The Constitution requires a "reasonable, certain and adequate provision for obtaining compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)). But this is exactly what *Williamson*

County's state litigation rule prevents. It creates a chaotic and unworkable system for adjudicating federal takings claims, *Wayside Church*, 847 F.3d at 825 (Kethledge, J., dissenting) (application of *Williamson County* "has undermined the adjudication of federal takings claims against states and local governments"), one that cries out for this Court's intervention. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (reconsideration of precedent justified "when governing decisions are unworkable"); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199, 240 (2006) ("[T]he *Williamson County* State Litigation prong should be reconsidered and eliminated.").

C. *Williamson County*'s State Litigation Requirement Is Doctrinally Flawed and Entirely Unnecessary

The problems flowing from *Williamson County*'s state litigation doctrine are especially troubling because the doctrine is incorrect. *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of certiorari); Michael W. McConnell, Horne *and the Normalization of Takings Litigation: A Response to Professor Echeverria*, 43 Envtl. L. Rep. News & Analysis 10749 (2013) (noting that the state litigation concept in "*Williamson County* . . . cannot be correct, at least on its own terms"). As noted above, *Williamson County* declares that a taking is not "without just compensation" and complete until a state *court* confirms lack of compensation. 473 U.S. at 196. This makes no sense.

In almost all takings cases, the state court is not the government body taking property, nor does it bear compensatory liability for a taking. These qualities fall on the shoulders of the executive or legislative agency responsible for invading private property. *See generally*, *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-92 (1978); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose."). It is the acts and omissions of the body taking the property that should determine if the taking is uncompensated. *See* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 43 (1992) ("[I]t makes little sense to require property owners to seek just compensation from the courts, as opposed to the governmental entity which imposed the regulation."). If a local or state entity makes a final decision regulating or invading property without offering or guaranteeing compensation, the taking is "without just compensation" and crystalized. *Horne*, 133 S. Ct. at 2062 n.6 (A takings "'Case' or 'Controversy' exists once the government has taken private property without paying for it.").

Requiring state court litigation in such a case adds nothing to the factual or legal sufficiency of a takings claim. *Id.* ("whether an alternative remedy exists does not affect the jurisdiction of the federal court"); *Del Prairie Stock Farm*, 572 F. Supp. 2d at 1033 ("a concrete takings injury can occur without state litigation"); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989 (1986) ("No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked."). It simply imposes an unnecessary and jurisdictionally disastrous exhaustion of state remedies rule. Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 Loy. L.A. L. Rev. 1065, 1077-78 (2007).

This case provides an example of how *Williamson County* prevents adjudication of claims already fit for review. There is no dispute here that the Township formally and finally enacted an ordinance that, on its plain terms, authorizes the public and the Township to physically occupy Ms. Knick's land, a quintessential physical taking. It is clear that the Township enforced these provisions against Ms. Knick, informing her that failure to open her land to the public violates the ordinance and commanding her to provide public access. App. A at 3-5. Finally, the Township has not paid or offered compensation to Ms. Knick, and neither the challenged Ordinance nor any other Township law contains a provision guaranteeing compensation. The Township actions against Ms. Knick are "without just compensation" and a claim for a Fifth Amendment violation is present. *Horne*, 133 S. Ct. at 2062 n.6.

Yet, *Williamson County* (supposedly) demands that courts ignore the violation of Ms. Knick's constitutional rights until she takes the time-consuming and expensive step of prosecuting a state court suit. While this requirement cannot make the takings issue more concrete, it causes delay, wastes Ms. Knick's and court resources, and may ultimately prevent any hearing. All of this is occurring under a doctrine without a compelling basis in the Constitution's "without just compensation" language or in the Court's historical precedent. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913) (rejecting a contention that the federal courts could not hear a property rights claim under the Fourteenth Amendment until the state courts had passed on the issue).

This Court should take this case to reconsider and overrule *Williamson County*'s state litigation ripeness requirement. *San Remo Hotel*, 545 U.S. at 352 ("I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts.") (Rehnquist, J. concurring). To be sure, *stare decisis* must be considered. However, this principle is weakest in the realm of constitutional interpretation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Moreover, stare decisis cannot immunize a particular procedural remedy "once [the procedural rule] is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965). For this reason, this Court is willing to reconsider judicial decisions that are cumbersome in operation. *See, e.g., Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it." (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))). *Williamson County*'s state litigation requirement clearly qualifies as an unworkable constitutional and procedural rule. As a result, *stare* *decisis* does not inhibit the Court from reconsidering *Williamson County*.

II.

THERE IS DEEP CONFLICT IN THE LOWER COURTS ON THE ISSUE OF WHETHER *WILLIAMSON COUNTY'S* STATE LITIGATION DOCTRINE APPLIES TO FACIAL TAKINGS CLAIMS

Given *Williamson County*'s dramatic effects, it is not surprising that federal courts have sought exceptions to the state litigation doctrine. Yet, in so doing, they have come into conflict. *Arrigoni*, 136 S. Ct. at 1412 (Thomas, J., dissenting from denial of cert.). This case concerns the most important and intractable federal conflict: whether *Williamson County* bars facial takings claims.

Here, the Third Circuit joined a handful of other circuits in holding that *Williamson County* applies to, and bars, facial physical and regulatory takings claims. This solidifies a conflict with other circuits that have declared *Williamson County* inapplicable to facial takings claims. The Court's review is necessary to resolve the conflict. *See* Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 Touro L. Rev. 297, 317 (2014) ("Until the Supreme Court steps in, there will be no uniformity.").

A. The First, Fourth, and Seventh Circuits Exempt Facial Claims from *Williamson County*

A number of circuit courts have concluded "that, *Williamson County* notwithstanding, takings plaintiffs remain free to raise facial Fifth Amendment challenges in federal courts in the first instance."

Katherine Mims Crocker, *Justifying a Prudential Solution to the* Williamson County *Ripeness Puzzle*, 49 Ga. L. Rev. 163, 186 (2014). The First Circuit is in this camp. In *Philip Morris, Inc. v. Reilly*, 312 F.3d 24 (1st Cir. 2002), that court held that a physical takings facial claim was ripe for federal adjudication on the merits without respect to state remedies. *Id.* at 30; *see also id.* 54 n.27 (Lipez, J., dissenting) (agreeing that the facial claims were ripe). The same circuit confirmed this view a few years later in *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007). There, the First Circuit again considered a facial physical takings claim and it again held that since the plaintiff "is making a facial statutory challenge, its takings claim need not be brought first to a Commonwealth body, either administrative or judicial." *Id.* at 14 (citing *Suitum*, 520 U.S. at 736 n.10).

The Fourth Circuit follows the same approach. In *Clayland Farm Enterprises, LLC v. Talbot County, Md.*, 672 F. App'x 240 (4th Cir. 2016), that circuit held that *Williamson County* did not prevent immediate federal review of "a regulatory takings claim that the moratorium [on development] is facially unconstitutional." *Id.* at 243. In so doing, the court stated: "[w]hen an ordinance on its face is alleged to have effected a taking . . . the claim accrues when the ordinance interferes in a clear, concrete fashion with the property's primary use. . . . Facial takings challenges to a regulation are 'generally ripe the moment the challenged regulation or ordinance is passed . . . .'" *Id.* at 244 (quoting *Suitum*, 520 U.S. at 736 n.10). This decision built on a prior Fourth Circuit opinion which also concluded that *Williamson County* "does not apply to facial [takings] challenges to the validity of a state regulation." *Holliday Amusement Co. v. South Carolina*, 493 F.3d 404, 407 (4th Cir. 2007).

To the same effect are decisions from the Seventh Circuit. In *Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir. 2007), a physical takings case, the Seventh Circuit observed that facial takings claims are exempt from *Williamson County*'s state litigation rule. *Id.* at 732. Then, in *Muscarello v. Ogle County Bd. of Com'rs*, 610 F.3d 416, 422 (7th Cir. 2010), the same court confirmed a circuit exception "to the exhaustion requirement" for "pre-enforcement facial challenges." In the 2017 decision of *International Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674, 678 (7th Cir. 2017), the Seventh Circuit re-confirmed and applied a *Williamson* exception for a "pre-enforcement facial challenge."

While the issue is not as developed in the Fifth and Eleventh Circuits, decisions from those jurisdictions also declare that *Williamson County* does not pertain to facial takings claims. *See Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 287 (5th Cir. 2012) ("The Supreme Court has held *Williamson County* to be inapplicable to facial challenges." (citing *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992)); *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla.*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013) ("*Williamson County*'s finality principles do not apply to facial claims that a given regulation is constitutionally infirm.").

B. The Third Circuit Joins the Sixth, Ninth, and Tenth Circuits in Applying *Williamson County* to Facial Takings Claims

In tension with the First, Fourth, and Seventh circuits, decisions from the Sixth, Ninth, and Tenth circuit hold that *Williamson County* applies to facial physical and regulatory takings claims. In *Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014), for instance, the Sixth Circuit considered a physical takings claim similar to that here. The court concluded that *Williamson County*'s "second requirement—that plaintiffs must seek just compensation through state procedures—does [apply]." *Id.* at 417.

The Ninth Circuit's decisions are in accord. In the early decision of *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), the Ninth Circuit held that "the just compensation ripeness requirement" applies to facial takings "claims premised upon the denial of a property's economically viable use." *Id.* at 407. Later, in *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1052-54 (9th Cir. 2004), the Ninth Circuit affirmed that all facial takings claims other than those under the now-defunct "substantially advances" test are subject to *Williamson County*. Similarly, in *Surf and Sand, LLC v. City of Capitola*, 377 F. App'x 662, 664 (9th Cir. 2010), the court held that a "facial challenge to the Conversion Ordinance as a public regulatory taking was not ripe [as] Plaintiff had not sought compensation from the state as required by *Williamson County*."

The Tenth Circuit has also squarely considered the facial ripeness issue. In *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011), the court considered a facial takings claim arising under *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374, and levied against development permit conditions. The Tenth Circuit concluded that *Williamson County*'s state litigation principle applied to this and all facial takings claims, except those arising under the defunct "substantially advances" test. 634 F.3d at 1175-76. In so doing, the Tenth Circuit attempted to distinguish decisions from other circuits declaring that facial takings claims are not bound by *Williamson County*, including several discussed above. *Id.*

In the decision below, the Third Circuit sided with the Sixth, Ninth, and Tenth Circuits in holding that *Williamson County*'s state litigation requirement applies to basic facial takings claims, like the physical takings claim asserted by Ms. Knick. The lower court held that the only facial claims exception to *Williamson County* is for claims that do not assert a taking without just compensation at all; i.e., claims arising under the Public Use Clause of the Fifth Amendment or Due Process Clause.

The decision below thus conflicts with the decisions of the First, Fourth and Seventh Circuits and exacerbates the ongoing conflict among the courts on whether *Williamson County* applies to facial takings claims resting on modern takings tests. The split has substantial practical import. In *Williamson County*-free circuits like the First and Seventh, a property owner with a facial physical takings claim receives a prompt hearing on the merits of her complaint. In contrast, in the Third and other circuits applying *Williamson County*, the same property owner will be kicked between federal and state courts without a hearing, with resources wasted and justice delayed or denied. David Zhou, Comment, *Rethinking the Facial Takings Claim*, 120 Yale L.J. 967, 973 (2011) ("[R]elaxed ripeness rule means that federal courts will actually have to reach the merits of some takings claims characterized as 'facial.'").

This Court should grant the Petition to resolve the conflict.

III.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN APPYING *WILLIAMSON COUNTY* TO FACIAL TAKINGS CLAIMS

The Third Circuit's treatment of facial takings claims conflicts not only with other circuit decisions, but also with this Court's takings precedent.

A. This Court's Precedent Exempts Facial Claims from *Williamson County*'s State Litigation Ripeness Doctrine

Notably, the decision at the heart of this case—*Williamson County*—did not involve a facial takings claim. It dealt solely with an as-applied claim alleging that application of a land use regulation to the particular property in that case stripped away its economic value. *Williamson County*, 473 U.S. at 176-84. Consistent with this reality, this Court's subsequent decisions recognize the potential applicability of a state litigation ripeness requirement in an *as-applied* taking case, but have never considered, much less applied, the concept in a *facial* case. *See, e.g.*, *Keystone*, 480 U.S. at 494 (reviewing a post-*Williamson County* facial takings case filed in federal court without concern for state remedies).

Instead, this Court's post-*Williamson County* jurisprudence repeatedly states and/or demonstrates that facial takings claims ripen upon enactment of the challenged law, without regard for state procedures. *Peters v. Village of Clifton*, 498 F.3d at 732 ("[T]he Supreme Court has held that many facial challenges to legislative action authorizing a taking can be litigated immediately in federal court."); *Opulent Life Church*, 697 F.3d at 287 ("The Supreme Court has held *Williamson County* to be inapplicable to facial challenges.").

In *Suitum*, the Court observed that facial takings challenges "are generally ripe the moment the challenged regulation or ordinance is passed." 520 U.S. at 736 n.10. In *San Remo*, it stated that the plaintiffs were "never required to ripen" their facial takings claims in state court, but "could have raised [them] directly in federal court." 545 U.S. at 345-46. The Court has put these statements into practice by affording merits review to many facial takings claims that arise in federal courts without prior state court litigation. *See, e.g.*, *Hodel*, 452 U.S at 273; *Keystone*, 480 U.S. at 494.

There is a logical reason for the Court's distinction between facial and as-applied takings claims with respect to *Williamson County*'s state litigation rule: facial claimants may seek to invalidate a law that textually takes property without a compensation guarantee, not just secure after-the-fact damages.[3] 545 U.S. at 345-46. This makes it unnecessary to require use of post-taking, state compensation procedures. *Id.*

B. The Decision Below Is Inconsistent with This Court's Jurisprudence

In tension with this Court's decisions, the decision below finds no difference between as-applied and facial takings claims when it comes to the application of *Williamson County*. The decision below holds that all takings claims are unreviewable without prior state ligation. More precisely, under the Third Circuit decision, both facial physical takings claims, such as the one Ms. Knick asserts, and "denial of all economically beneficial use" regulatory takings claims are subject to *Williamson County* and unripe without state court litigation. Ultimately, the lower court concluded that this Court has only allowed facial takings claims based on the abrogated "substantial advances" takings test to proceed without state litigation.

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[3] The invalidation remedy is possible in facial takings cases because, when the text of a law causes an immediate taking in all or almost all applications, the law's validity is conditioned upon a concurrent mechanism for compensating affected owners. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984) ("To the extent that the operation of the statute provides compensation, no taking has occurred . . . ."); *Arrigoni*, 136 at 1410 (Thomas, J., dissenting from denial of certiorari) (Constitution places a just compensation condition on the exercise of the power to take property). Without a compensation guarantee in the statute, it is unlawful and the claimant may seek declaratory relief or other non-monetary remedies to invalidate the offending law. *See, e.g.*, *Keystone*, 480 U.S. at 494 (injunctive and declaratory relief); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978) (declaratory relief).

This view is irreconcilable with the history of facial takings litigation in this Court. The Court has reviewed facial takings cases arising under every extant takings standard (i.e., non-"substantially advances" claims), without concern for exhaustion of state remedies. *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987) (facial physical takings claim); *Hodel*, 452 U.S at 273 (denial of economic use takings claim); *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224-25 (1986) (facial "*Penn Central*" regulatory takings claim). These cases confirm the Court's explicit statements in other cases that state remedies are inapplicable to facial takings claims.

The decision below, and other decisions like it, badly stray from this precedent in holding that facial claims cannot be resolved until the claimant sues in state court. Indeed, under the lower court's reasoning, few of the Court's facial takings cases were properly before the Court. The Court should clarify that this view is wrong and thereby resolve the conflict about whether facial takings claims can be adjudicated free from *Williamson County*'s state litigation requirement.

In sum, *Williamson County* can and should be reconsidered from the ground up because of clear and persistent evidence it is unworkable and wrongly decided. This case is a proper vehicle for doing so. However, if the Court is not inclined to take that step here, it should grant review to resolve the festering conflict on whether *Williamson County* applies to facial takings claims. Without this Court's intervention, *Williamson County* will continue to drag property owners through a Kafkaesque litigation process, federal courts will continue to issue confused and conflicting rulings, and important takings controversies will disappear in *Williamson County*'s procedural black hole without a hearing.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

DATED: October, 2017.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3587

ROSE MARY KNICK,
Appellant
v.
TOWNSHIP OF SCOTT;
CARL S. FERRARO, Individually and in
his Official Capacity as Scott
Township Code Enforcement Officer

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 3-14-cv-02223
District Judge: The Honorable A. Richard Caputo

Argued April 25, 2017

Before: SMITH, *Chief Judge,*
McKEE, and RENDELL,
Circuit Judges

(Filed: July 6, 2017)

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OPINION

SMITH, *Chief Judge.*

On December 20, 2012, the Township of Scott in Lackawanna County, Pennsylvania enacted an ordinance regulating cemeteries. The ordinance authorizes officials to enter upon any property within the Township to determine the existence and location of any cemetery. The ordinance also compels property owners to hold their private cemeteries open to the public during daylight hours. The plaintiff, Rose Mary Knick, challenges the ordinance on two grounds. First, Knick argues that the ordinance authorizes unrestrained searches of private property in violation of the Fourth Amendment. Second, Knick argues that the ordinance takes private property without just compensation in violation of the Fifth Amendment.

The Township's ordinance is extraordinary and constitutionally suspect. However, important justiciability considerations preclude us from reaching the merits. Because Knick concedes that her Fourth Amendment rights were not violated and fails to demonstrate that they imminently will be, Knick lacks standing to advance her Fourth Amendment challenge. And as the District Court correctly held, Knick's Fifth Amendment claims are not ripe until she has sought and been denied just compensation using Pennsylvania's inverse condemnation procedures, as required by the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). We will therefore affirm.

I

On December 20, 2012, the Township of Scott enacted Ordinance No. 12-12-20-001, titled "Ordinance of the Township of Scott Township [sic], Lackawanna County, Pennsylvania, Relating to the Operation and Maintenance of Cemeteries and Burial Places" (hereinafter, the "Ordinance"). App. 82. The Ordinance applies to "[a]ll cemeteries, whether private or public, and whether existing or established prior to the date of this Ordinance or hereafter created." *Id.* It requires cemetery owners to "properly maintain and upkeep any cemetery." App. 83.

Critical to this case are two provisions of the Ordinance. First, it requires that "[a]ll cemeteries within the Township shall be kept open and accessible to the general public during daylight hours. No owner . . . shall unreasonably restrict access to the general public nor shall any fee for access be charged." *Id.* We will refer to this as the "public-access provision."

Second, the Ordinance permits the Township's "Code Enforcement Officer and/or his/her agents and representatives [to] enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery, in order to ensure compliance with the terms and provisions of this Ordinance." *Id.* We will refer to this as the "inspection provision."

Anyone who violates the Ordinance is subject to a fine of between $300 and $600, and "[e]ach day that the violation exists shall constitute a separate offense." *Id.*

On April 10, 2013, the Township Code Enforcement Officer, Carl S. Ferraro, entered Knick's property without an administrative warrant. Ferraro identified certain stones on Knick's property as grave markers and issued a Notice of Violation dated April 11, 2013. Knick disputes that a cemetery exists on her property.

On May 7, 2013, Knick brought suit against the Township in the Lackawanna County Court of Common Pleas seeking declaratory and injunctive relief. Knick filed an Emergency Motion for Injunctive Relief on or about that same date. The parties stipulated that the Township would withdraw its Notice of Violation and further stipulated to an order staying any enforcement actions against Knick. A hearing was held on October 8, 2014. Then, on October 21, the Court ruled that it "will render no decision on the matter." App. 261. Specifically, the Court ruled "that it is not the proper venue for this matter, since the case is not in the proper posture for a decision to be rendered on the Plaintiff's requested forms of relief." *Id.*[1] Then, on October 31, the Township issued another Notice of Violation. Knick filed a Petition for Contempt of Court in the Lackawanna County Court of Common Pleas, which the Court denied on January 30, 2015. At no point did Knick institute an inverse-condemnation proceeding against the Township. *See* 26 Pa. Const. Stat. Ann. § 502(c).

Knick filed this action on November 20, 2014 in the United States District Court for the Middle District of Pennsylvania. In her original Complaint, Knick asserted four Counts under 42 U.S.C. § 1983: (I) Fourth Amendment claims against the Township for maintaining a warrantless inspection regime (the facial challenge) and entering Knick's property without a warrant (the as-applied challenge); (II) a Fourth Amendment claim against the Township for failure to train its officials to obtain administrative warrants; (III) Fourth and Fourteenth Amendment claims against Ferraro in his official capacity for entering Knick's property without a warrant; and (IV) claims seeking invalidation of the Ordinance on Fourth, Fifth, and Fourteenth Amendment grounds, including, *inter alia*, vagueness, improper exercise of the Township's police power, and taking private property without just compensation. After the Township filed its motion to dismiss, Knick filed an Amended Complaint, which added Count V for declaratory and injunctive relief. By Order dated

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[1] Although not apparent from the face of the Order, a subsequent state-court judge opined that "[a] reasonable interpretation" of the Order is that "Knick's constitutional challenge to the Ordinance should be litigated in any civil enforcement proceeding that may be filed by the Township." App. 192.

October 28, 2015, the District Court dismissed Counts I-III with prejudice and dismissed Counts IV and V without prejudice.

Knick filed a Second Amended Complaint on November 16, 2015. The Second Amended Complaint asserts three Counts: (I) the Fourth Amendment claims pled in Count I of the original complaint; (II) a claim that the Ordinance takes Knick's private property without just compensation, in violation of the Fourth, Fifth, and Fourteenth Amendments; and (III) claims for declaratory and injunctive relief because, *inter alia*, the Ordinance unconstitutionally takes Knick's property and authorizes unconstitutional searches. By Order dated September 7, 2016, the District Court dismissed Count I with prejudice for the reasons provided in its earlier decision and dismissed Counts II and III without prejudice pending exhaustion of state-law remedies.

This appeal timely followed. On appeal, Knick argues that the District Court erred by dismissing her Fourth Amendment facial challenge and by requiring her to exhaust state-law remedies for her takings claims.

II

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction to review "final decisions of the district courts," 28 U.S.C. § 1291, and we must assure ourselves of our jurisdiction sua sponte, *see, e.g., Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 118 (3d Cir. 1999). Although the District Court dismissed Knick's Second Amended Complaint without prejudice as to certain claims, we conclude that Knick nonetheless appealed from a final decision.

A final, appealable decision is one "by which a district court disassociates itself from a case." *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)). "While decisions of the Court have accorded § 1291 a practical rather than a technical construction, the statute's core application is to rulings that terminate an action." *Id.* (citations and internal quotation marks omitted). For that reason, dismissals without prejudice are ordinarily not final; leave to amend contemplates "further proceedings in the district court as part of the same action." *Doe v. Hesketh*, 828 F.3d 159, 165 (3d Cir. 2016) (quoting *Aluminum Co. of Am. v. Beazer E., Inc.*, 124 F.3d 551, 560 (3d Cir. 1997)).

But "[e]ven dismissals without prejudice have been held to be final and appealable if they end [ ][the] suit so far as the District Court was concerned." *Id.* (alterations in original) (quoting *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 198 n.3 (3d Cir. 2001)); *see also United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949). For example, we will review a dismissal without prejudice if a plaintiff stands on the complaint rather than exercising leave to amend, *Palakovic v. Wetzel*, 854 F.3d 209, 219 (3d Cir. 2017), if a plaintiff argues that administrative exhaustion would be futile, *Ghana v. Holland*, 226 F.3d 175, 180-81 (3d Cir. 2000), or if a plaintiff's claims are "effectively barred" from being subsequently reasserted due to the running of a statute of limitations or some similar obstacle, *LNC*

Invs., LLC v. Republic Nicar., 396 F.3d 342, 346 (3d Cir. 2005).

Here, the District Court dismissed Knick's takings claim without prejudice and directed her to exhaust state remedies. The District Court did not retain jurisdiction and closed the case. Its order further specified that, following the conclusion of state proceedings, any remaining takings claims must be "re-fil[ed] . . . in federal court." App. 57. As such, "there cannot be—and, by court order, there will not be—any further proceedings in the district court as part of the same action." *Beazer E.*, 124 F.3d at 560. "[T]he district court has divested itself of [the] case entirely, regardless of the fact that claims in the case may continue to go forward in state court." *Erie Cty. Retirees Ass'n v. Cty. of Erie*, 220 F.3d 193, 202 (3d Cir. 2000). The decision in this case is therefore final "even if a similar case may be filed in the future because the dismissal was without prejudice." *Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 506 (7th Cir. 2009); *see also Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 385-86 (D.C. Cir. 2017); *Hitchcock v. Cumberland Univ. 403(b) DC Plan*, 851 F.3d 552, 557-58 (6th Cir. 2017); *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 219 (2d Cir. 2006) ("[A] dismissal without prejudice, absent some retention of jurisdiction, is a final decision . . . ."); *cf. Blair v. Scott Specialty Gases*, 283 F.3d 595, 602 (3d Cir. 2002) (dismissal without prejudice in favor of arbitration is appealable where the District Court did not retain jurisdiction, even though further court proceedings may ensue following arbitration).

Thus, we are satisfied that the District Court's decision is a "final" one, and we have appellate jurisdiction under § 1291. We proceed to Knick's claims.

III

We begin with Knick's facial Fourth Amendment challenge. We conclude that she lacks Article III standing because she has failed to demonstrate an injury-in-fact and redressability.

A

The Second Amended Complaint asserts both facial and as-applied challenges to the Ordinance under the Fourth Amendment. As part of her as-applied challenge, Knick claimed to be injured by an unlawful search of her property. But the District Court ruled that the search in question was lawful, and Knick does not appeal that ruling. Although not initially raised by the parties,[2] the question before us is whether Knick may persist in her facial Fourth Amendment challenge even though her own rights were not violated. Following supplemental briefing and oral argument by the parties, we conclude that Knick has failed to carry her burden to demonstrate Article III standing to challenge the Ordinance on Fourth Amendment grounds.

"[T]he irreducible constitutional minimum of standing contains three elements": injury in fact, causation, and redressability. *Lujan v. Defs. of*

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[2] The Township did advance the curious argument that Knick's claim fails the requirements of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because Knick failed to demonstrate a cognizable injury. But that is not a requirement unique to *Monell*; it is a general requirement of all cases and controversies under Article III of the Constitution.

Wildlife, 504 U.S. 555, 560-61 (1992). As "[t]he party invoking federal jurisdiction," Knick "bears the burden of establishing these elements." *Id.* at 561. "Plaintiffs must have standing at all stages of the litigation," and certain findings by a district court may require a subsequent reevaluation of standing. *Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997).

The first element, injury in fact, "is often determinative." *Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 138 (3d Cir. 2009). The plaintiff must demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted). To be concrete, an injury need not be "tangible," but "it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). Generalized grievances will not suffice. *See Schuchardt v. President of the U.S.*, 839 F.3d 336, 344-45 (3d Cir. 2016) (distinguishing between generalized and widely shared grievances). Furthermore, "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Lujan*, 504 U.S. at 564 n.2). If the injury is sufficient under those standards, it must also be "fairly traceable to the challenged action[] and redressable by a favorable ruling" in accordance with the remaining two elements of standing. *Id.* (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).

In this case, the District Court ruled that the search of Knick's property complied with the Fourth Amendment because Ferraro searched an open field. "[A]n open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment." *United States v. Jones*, 565 U.S. 400, 411 (2012) (citation omitted) (citing *Oliver v. United States*, 466 U.S. 170, 176-77 (1984)). Because Knick does not challenge that ruling on appeal, she has accepted the District Court's conclusion that her Fourth Amendment rights were not violated. She has likewise accepted that her property was not even "searched" in the constitutional sense. *Id.* at 411 n.8. Even if Township officials were likely to return to the same part of Knick's property for further inspections, those would *also* be open-field searches not subject to Fourth Amendment protection. As discussed below, nothing in the record suggests that any future inspections would invade her home's curtilage.

As a result, any "injury" arising from open-field searches would not be legally protected. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000) ("The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right."). Nor would that injury be redressable. If we were to enjoin the Ordinance's inspection provision today, the Township would still be able to use the open-fields doctrine to enter the part of Knick's property where a cemetery was allegedly discovered.[3] Put differently, Knick's situation is one "for which [the Ordinance] is irrelevant"; the Ordinance does "no work" in authorizing searches that would be independently lawful under established Fourth Amendment doctrines. *Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015).

Perhaps realizing these deficiencies, Knick changed tack in her supplemental brief. Now Knick attempts to premise standing on the fact that the Ordinance may permit the Township to search the curtilage of her home—an area of her property that is protected by the Fourth Amendment. *See* Knick Supp. Br. 3 ("Knick owns property, including curtilage, subject to this provision. She has alleged the Ordinance authorizes an invasion of her property. That is enough for standing, particularly at this early stage." (citations omitted)).

There are two problems with this theory. First, simply owning property protected by the Fourth Amendment describes a generalized grievance common to all residents of the Township. *See Lujan*, 504 U.S. at 575-76. We have recognized standing to challenge government search programs that are "universal in scope," but not before ensuring that the plaintiffs' injuries were "unmistakably personal." *Schuchardt*, 839 F.3d at 346. Knick has not alleged any personal harm arising from a threatened or actual curtilage search. Second, Knick cannot base standing on a future invasion of her home's curtilage without demonstrating an "actual or imminent, not conjectural and hypothetical" injury. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Simply owning property subject to a hypothetical search is "too speculative for Article III purposes." *Clapper*, 133 S. Ct. at 1147. *Compare id.* at 1148 (holding that plaintiffs lacked standing to bring facial Fourth Amendment challenge to a statute authorizing NSA surveillance because plaintiffs failed to demonstrate a "certainly impending" risk that their communications would be intercepted), *with Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 166-67 (3d Cir. 2016) (holding that plaintiffs demonstrated standing to bring facial Fourth Amendment challenge where, *inter alia*, the plaintiffs incurred costs complying with a regulation that specifically targeted their type of business).[4]

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[3] While an open-field search does not run afoul of the Fourth Amendment, it may still constitute trespass. *See Oliver*, 466 U.S. at 183. Knick does not argue that Ordinance allows Township officials to avoid liability for trespass. And even if it did, Knick does not argue that injury arising from a lack of trespass remedy could confer standing to mount a Fourth Amendment challenge where no Fourth Amendment injury has occurred or is imminent.

Accordingly, we conclude that Knick failed to demonstrate a redressable injury-in-fact and therefore lacks standing.[5]

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[4] There is no substantively lenient standard "at this early stage" as Knick claimed. Knick Supp. Br. 3. "[E]ach element must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. As such, we simply apply the pleading standard to determine if Knick's allegations are sufficient to establish each element of standing. Even accepting Knick's allegations as true, they are insufficient for the reasons provided above.

[5] Our holding can also be understood in terms of ripeness, which "originate[s] from the same Article III requirement of a case or controversy." *Free Speech Coal.*, 825 F.3d at 167 n.15. "[I]f no injury has occurred, the plaintiff can be told either that *she*

B

In an attempt to salvage her Fourth Amendment claim, Knick argues that she has standing to assert a pure facial challenge without raising, much less proving, an accompanying as-applied challenge. Our holding, however, is rooted in time-tested principles of justiciability, not in any special attribute of facial or as-applied challenges. As courts and commentators have recognized, those labels often introduce confusion, and "the distinction . . . is not so well defined that it has some automatic effect." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *see* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1336 (2000) [hereinafter Fallon, *As-Applied and Facial Challenges*] (arguing that facial and as-applied challenges are not "sharply categorically distinct"). Nonetheless, there are several points about the interaction between those concepts that we must clarify.

As a general matter, Knick's argument is correct: there is no requirement that a facial challenge be accompanied by an as-applied challenge. *See, e.g.*,

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cannot sue, or that she cannot sue *yet*." *Id.* (quoting *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir. 1994)). If Knick or any other resident of the Township can demonstrate a cognizable injury arising from a search independently authorized by the Ordinance, such as a curtilage search, then the Ordinance may be ripe for judicial review. Once such a claim is properly presented, the Ordinance cannot be upheld on the ground that individual searches might be "conducted under an exception to the warrant requirement[] or pursuant to a warrant itself," because those scenarios are "irrelevant to our analysis of a statute's facial validity." *Id.* at 168 (citing *Patel*, 135 S. Ct. at 2451).

Patel, 135 S. Ct. 2443. Litigants with standing to challenge a law have considerable "flexibility . . . to shape the issues in litigation." Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 947 (2011) [hereinafter Fallon, *Fact and Fiction*]. Litigants may argue that the law cannot be constitutionally applied to them due to some particular set of facts or circumstances (an as-applied challenge), that the law is unconstitutional in every application, including their own (a facial challenge), or both.[6]

However, even if a litigant does not allege a violation *as* applied, the law in question must still typically *be* applied—or at least be at risk of imminent application. That is because plaintiffs must always demonstrate the "irreducible constitutional minimum" of Article III standing. *Lujan*, 504 U.S. at 560. Facial challenges are no exception. *See Williams v. Lew*, 819 F.3d 466, 476 (D.C. Cir. 2016). Furthermore, as prudential matter, a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). That prudential rule is relaxed in certain doctrinal contexts, most notably in First Amendment claims.[7] *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973); *Osediacz v. City of Cranston*, 414 F.3d 136, 140-41 (1st Cir. 2005); *see also Pa. Prison Soc'y v. Cortés*, 508 F.3d 156, 168-69 (3d Cir. 2007) (declining to extend the solicitude shown in the "highly exceptional First Amendment context" to facial challenges raised under the Ex Post Facto and Due Process clauses).

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[6] *See United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) (defining as-applied challenges as those that "contend that a law['s] . . . application to a particular person under particular circumstances deprived that person of a constitutional right"); *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 308 n.11 (3d Cir. 2007) (defining facial challenges as those brought by "a single party [who] asserts that a law is invalid *not only* as applied to them, but as applied to all parties that might come before the court" (emphasis added)).

Plaintiffs with standing to challenge a law may assert solely facial challenges, but in doing so they accept a higher substantive burden. As the Supreme Court has repeatedly intoned, facial challenges are "the most difficult . . . to mount successfully" because the challenger "must establish that no set of circumstances exist under which the [statute] would be valid." *Patel*, 135 S. Ct. at 2449, 2450 (alterations in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[8] The Supreme Court has repeatedly discouraged litigants from asserting facial challenges—particularly where surveying the full range of possible applications is made difficult by a barebones record or a need for technical expertise. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008) (noting that facial challenges are disfavored because, in part, they "threaten to short circuit the democratic process"); *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (noting that facial challenges to an abortion-related law "should not have been entertained in the first instance," and instead should have been presented as "preenforcement, as-applied challenges" so that the Court could better assess "the nature of the medical risk" alleged); *Sabri v. United States*, 541 U.S. 600, 608-10 (2004) (noting that "facial challenges are best when infrequent" because "they invite judgments on fact-poor records" and "depart[] from the norms of adjudication in federal courts").

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[7] The solicitude shown to First Amendment rights is likely inapplicable in the Fourth Amendment context. It is well established that "Fourth Amendment rights are personal rights . . . which may not be vicariously asserted." *Schuchardt*, 839 F.3d at 346 (alteration in original) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Thus, if Knick attempted to base standing on the Fourth Amendment rights of hypothetical third parties, standing would be strongly disfavored for prudential reasons even if she suffered a cognizable injury-in-fact. *Cf. Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 69 (1974) (holding that a bank could not assert the Fourth Amendment rights of its customers). Knick wisely does not invoke third-party standing here.

[8] We note that "some Members of the [Supreme] Court have criticized the *Salerno* formulation," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008), but the Supreme Court recently reaffirmed that *Salerno* applies at least in the Fourth Amendment context, *Patel*, 135 S. Ct. at 2450.

If a litigant decides to bring both types of challenge, a court's ruling on one might affect the other. For example, ruling that a law is facially invalid "negates any need" to address an as-applied challenge. *Heffner v. Murphy*, 745 F.3d 56, 65 n.7 (3d Cir. 2014). But if a litigant loses an as-applied challenge because the court rules as a matter of law that the statute or ordinance was constitutionally applied to her, it follows *a fortiori* that the law is not unconstitutional in all applications. *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010); *see also Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 154-56 (1979) (holding that criminal defendants could not mount a facial challenge to a statute that had been constitutionally applied at their trial); *United States v. Raines*, 362 U.S. 17, 24-25 (1960); *Woollard v.*

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Gallagher, 712 F.3d 865, 882-83 (4th Cir. 2013); *Mosby v. Ligon*, 418 F.3d 927, 933 (8th Cir. 2005). If the litigant loses an as-applied challenge because the law was not in fact applied, or the law did no work in authorizing the Government's challenged conduct, then courts should be careful to ensure that any remaining challenges are justiciable. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011) (noting that, in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32, 40-41 (1999), a facial challenge was unavailable because "the plaintiff had not suffered a personal First Amendment injury and could prevail only by invoking the rights of others").

On the other hand, there are situations where a failure on one claim might not preclude success on the other. If a litigant loses an as-applied challenge because the allegedly unconstitutional circumstances of enforcement are simply "not supported by [the] record," *Heffner*, 745 F.3d at 65 n.7, and the litigant otherwise has standing to challenge a law (such as a defendant in an enforcement action), then "a court cannot simply refuse to address a facial challenge that offers a defendant her last chance to argue that the statute being enforced against her is constitutionally invalid." Fallon, *Fact and Fiction* at 963. And of course, a litigant who fails to prove that a law is unconstitutional in *all* applications might still prove that it was applied unconstitutionally to her. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (holding that losing earlier pre-enforcment facial challenge did not preclude post-enforcement as-applied challenge).

A recent illustration of these principles is *Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), where the Supreme Court approved of a standalone facial challenge arising under the Fourth Amendment. *Patel* involved an ordinance that authorized law enforcement officials to search hotel registries without an administrative warrant. Several hotel operators sued, claiming that the ordinance was facially invalid. In *Patel*, the challenged ordinance had been, and would have continued to be, applied against the hotels to authorize warrantless searches. The parties stipulated as much, satisfying the imminence requirement. *Id.* at 2448. Thus, the plaintiffs presented a dispute about whether their rights would be violated as a function of the ordinance's facial validity. Similarly, in our recent decision in *Free Speech Coalition*, the plaintiffs demonstrated an imminent risk that they would be subjected to an allegedly unconstitutional inspection regime. 825 F.3d at 166-67. Their rights likewise turned on the facial validity of the law in question.

Not so here. Knick makes no reasonable allegation that her Fourth Amendment rights (or anyone else's) were, or will imminently be, violated. The fact that Knick challenges the Ordinance on its face does not relieve her from that fundamental burden.

* * *

We recognize that the Ordinance's inspection provision "is constitutionally suspect and we encourage the [Township] to abandon it (or, at least, to modify it substantially)." *Osediacz*, 414 F.3d at 143. It is difficult to imagine a broader authorization to conduct searches of privately owned property.[9] But we are not a "roving commission[] assigned to pass judgment on the validity of the Nation's laws." *Broadrick*, 413 U.S. at 611. We cannot adjudicate the merits of the inspection provision without a plaintiff who has a cognizable interest in the outcome. Accordingly, we will affirm the dismissal of Knick's remaining Fourth Amendment claim on the alternative ground that Knick lacks standing.

IV

We turn then to Knick's Fifth Amendment takings claims. Knick argues that the Ordinance effectuates an uncompensated taking of her private property by requiring her to hold her land open to the public and to Township inspectors.

Before a takings claim is ripe, plaintiffs should (subject to certain exceptions) comply with two prudential requirements set forth in the Supreme Court's decision *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). First, the "finality rule" requires that the government "has reached a final decision regarding the application of the regulation to the property at issue." *Id.* at 186. Second, the plaintiff must seek and be denied just compensation using the state's procedures, provided those procedures are adequate. *Id.* at 194.[10]

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[9] Knick asserted before the District Court that the Ordinance was enacted in retaliation for her repeated confrontations with Township Supervisors over their management decisions. The District Court dismissed this retaliation claim, and Knick has not appealed that ruling.

In this case, the Township argues that Knick failed to comply with the second *Williamson County* prong, exhaustion of state-law compensation remedies, because Knick did not pursue inverse-condemnation proceedings under Pennsylvania's Eminent Domain Code, 26 Pa. Cons. Stat. Ann. §§ 101 et seq. *See Cowell v. Palmer Twp.*, 263 F.3d 286, 291 (3d Cir. 2001) (holding that plaintiffs' takings claim was not ripe because they did not file an inverse-condemnation petition). Knick responds that she was not required to pursue inverse-condemnation proceedings for three reasons. First, Knick argues that her facial takings claim is exempt from exhaustion. Second, Knick argues that she did in fact comply with *Williamson County* by unsuccessfully suing for declaratory and injunctive relief in state court. And third, Knick argues that we should overlook *Williamson County*'s prudential requirements in the interest of efficiency. We reject all three arguments.

A

First, Knick argues that her facial takings claim need not be exhausted through state-court procedures. Specifically, Knick asserts that this Court wrongly decided *County Concrete Corp. v. Town of*

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[10] As a general matter, "there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action." *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 168 (3d Cir. 2006) (quoting *Williamson Cty.*, 473 U.S. at 192). *Williamson County*'s second prong therefore is not a "true" exhaustion requirement, but "merely addresses a unique aspect of Just Compensation Takings claims." *Id.*

Roxbury, 442 F.3d 159 (3d Cir. 2006), the case relied upon by the District Court, which required exhaustion for a similar facial claim. We cannot overrule our own precedent, but we nonetheless conclude that Knick's argument is misplaced.

There is no question that the first prong of *Williamson County*, the finality rule, does not apply to "a claim that the mere enactment of a regulation . . . constitutes a taking without just compensation." *Id.* at 164. That exception to the finality rule makes sense: if the mere enactment of the ordinance constitutes a taking, there would be no need to wait for any "final decision." *See CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 626-27 (3d Cir. 2013).

The question before us is whether facial claims are also exempt from the second prong of *Williamson County*, the exhaustion of state-law compensation remedies. In *County Concrete*, this Court held that "a *facial* Just Compensation Takings claim . . . does not relieve [plaintiffs] from the duty to seek just compensation from the state." 442 F.3d at 168. The District Court correctly applied that holding here.

Knick argues, however, that our decision in *County Concrete* is contrary to Supreme Court authority. For example, in *San Remo Hotel, L.P. v. San Francisco*, the Supreme Court stated that the petitioners "have overstated the reach of *Williamson County* throughout this litigation" because the petitioners were "never required to ripen" their facial claims. 545 U.S. 323, 345 (2005). Similarly, in *Suitum v. Tahoe Regional Planning Agency*, the Supreme Court noted that facial challenges "are generally ripe the moment the challenged regulation or ordinance is passed." 520 U.S. 725, 736 n.10 (1997); *see also Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992).

We clarify that there is no conflict between these lines of authority and that *Williamson County*'s second prong is applicable to this case.

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This "seeming inconsistency" in the law arises because the Supreme Court has used the word "facial" in two ways. *Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996). First, the Supreme Court has referred to a type of taking as "facial"—where "the mere enactment of a statute constitutes a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). Second, the Supreme Court has used the word "facial" to refer to a type of legal challenge that seeks to invalidate a taking rather than obtain just compensation. *See Yee*, 503 U.S. at 534 (describing a facial challenge as one that "does not depend on the extent to which petitioners are . . . compensated"). These two uses of the term "facial" are conceptually distinct.

Regarding the first use—"facial taking"—it is important to understand that the government does not violate the Fifth Amendment simply because one of its actions "constitutes a taking." *Bituminous Coal*, 480 U.S. at 494. The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power": the provision of just compensation. *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304, 314 (1987); *see Cty. Concrete*, 442 F.3d at 168 ("[T]he Fifth Amendment bars not just the taking of property, but the taking of property without just compensation." (internal quotation marks omitted)). Thus, "even if a zoning ordinance, on its face, 'takes' property for Fifth Amendment purposes, no constitutional violation occurs until the state refuses to justly compensate the property owner." *Sinclair Oil*, 96 F.3d at 406. Accordingly, a facial taking is not automatically unconstitutional; it simply "gives rise to an unqualified constitutional obligation to compensate" the property owner. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002).

The second use—"facial challenge"—describes a type of claim, not a type of taking. A plaintiff who brings a facial challenge attacks the "underlying validity" of a law or regulation that allegedly effectuates a taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). "No amount of compensation can authorize" a taking rooted in a facially invalid law. *Id.* When a party challenges the fundamental validity of a law, the claim turns on an issue that arises logically and temporally prior to the denial of compensation. As such, there is no reason to wait for compensation to be denied; the constitutional violation would occur at the moment the invalid statute or regulation becomes effective.

This distinction between the facial takings and facial challenges explains how our decision in *County Concrete* is fully compatible with the Supreme Court's statements in *San Remo Hotel*, *Suitum*, and *Yee*. Those Supreme Court cases each describe a facial challenge. *See, e.g.*, *San Remo Hotel*, 545 U.S. at 345-46 (noting that the plaintiffs "requested relief distinct from the provision of 'just compensation'"). The Court was discussing a now-defunct legal theory: the claim that "a general zoning law to particular property effects a taking if the ordinance does not substantially advance a legitimate state interest." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). That test is no longer good law after *Lingle*, but modern plaintiffs have other tools at their disposal to challenge the underlying validity of a taking. "[I]f a government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action." *Lingle*, 544 U.S. at 543.

By contrast, the Fifth Amendment claim in *County Concrete* for which this Court required exhaustion was not a facial challenge. The taking occurred on the face of an ordinance, but the plaintiff merely sought compensation. That is why this Court emphasized that the claim at issue was "a *facial Just Compensation* Takings claim." *Cty. Concrete*, 442 F.3d at 168 (second and third emphases added). The plaintiff's true facial challenges to the law—for violating Substantive Due Process and the Equal Protection Clause—were not subject to exhaustion. *Id.* at 168-69; *see Sinclair Oil*, 96 F.3d at 406 (noting that the "seeming inconsistency" should be resolved "by analyzing the type of facial taking claim at issue in a particular case").[11]

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[11] Knick further argues that *County Concrete* was overruled by *Horne v. Department of Agriculture*, which noted that "[a] 'Case' or 'Controversy' exists once the government has taken private property without paying for it" regardless of "whether an alternative remedy exists." 133 S. Ct. 2053, 2062 n.6 (2013). But there, the Supreme Court was discussing constitutional requirements under Article III, not prudential ripeness under

To summarize, a plaintiff may be excused from the first prong of *Williamson County* depending on the type of taking alleged. If the taking occurred through an exercise of discretion, the plaintiff must demonstrate that the government reached a final decision. *Williamson Cty.*, 473 U.S. at 186. But if the taking occurred on the face of a statute, ordinance, or regulation, that requirement does not apply. *Cty. Concrete*, 442 F.3d at 164-65. As for *Williamson County*'s second prong, the plaintiff may be excused from exhausting state-law remedies depending on the type of claim asserted and the form of relief appropriate for that claim. If the plaintiff's claim is based on a lack of compensation—i.e., the claim arises under the Just Compensation Clause—then the plaintiff must first seek compensation under state law (provided the state's procedures are adequate). *Id.* at 168. If instead the plaintiff challenges the underlying validity of the taking, perhaps for lacking a public purpose or for violating due process, then the denial of compensation is irrelevant to the existence of a ripe claim and *Williamson County*'s second prong is inapplicable. *Id.* at 168-69.

2

Despite their being characterized as facial challenges, Knick's claims are, unavoidably, claims

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Williamson County. *Horne* in fact reaffirmed that "a Fifth Amendment claim is premature until it is clear that the Government has both taken property *and* denied just compensation." *Id.* at 2062. The Court in *Horne* concluded that the takings claim was not premature, but only because the usual remedies had been withdrawn. Knick has not argued that remedies through inverse condemnation proceedings are unavailable.

for compensation. They are therefore subject to exhaustion under *Williamson County*.

Knick does not claim that the alleged taking violates the Public Use Clause. Furthermore, the District Court dismissed the due-process claims asserted in Knick's original complaint, and Knick does not appeal that ruling. All that remains is the allegation that the Township violated the Fifth Amendment because it took Knick's property *without compensation*. As pled in the Second Amended Complaint:

> 36. The Ordinance requires private property owners to allow the general public to enter, traverse, and occupy their private land, *without compensation*, every day of the year. As such, on its face, the Ordinance causes an unconstitutional physical invasion and taking of private property.
>
> 37. The Ordinance also causes an unconstitutional physical taking on its face in authorizing the Township's "Code Enforcement Officer and/or his/her agents and representatives" to enter, traverse and occupy private property for the purpose of determining the "existence" of any cemetery, *without any provision of compensation* to the effected owners.
>
> . . .
>
> 42. As applied to Plaintiff, the Ordinance effects an *uncompensated* physical taking of her property by requiring Plaintiff to open

> her private property to the public, on pain of civil fines and penalties.

App. 263-64 (emphases added).

To be sure, Knick's Second Amended Complaint seeks injunctive relief. But Knick has no surviving claim that the *taking itself* was invalid, apart from the fact that she has not received compensation. The remedy for an uncompensated (but otherwise valid) taking is compensation.

Knick argues that invalidation of the Ordinance is still appropriate because the Ordinance does not provide a self-contained mechanism for compensating property owners. This argument is misplaced. "[T]he Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Williamson Cty.*, 473 U.S. at 194 (internal quotation marks omitted). That provision here is inverse-condemnation proceedings under Pennsylvania's Eminent Domain Code.

Accordingly, we conclude that Knick's claims arise under the Just Compensation Clause subject to exhaustion under *Williamson County* and must therefore be exhausted using inverse-condemnation proceedings.

B

Second, Knick argues that she exhausted state-law remedies because she sued unsuccessfully in state court. We disagree.

The Eminent Domain Code provides the "complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages." 26 Pa. Cons. Stat. Ann. § 102(a). Knick did not pursue the "complete and exclusive procedure" to obtain compensation, *id.*, and therefore failed to ripen her claims, *see Cowell*, 263 F.3d at 291.

Knick's state-court action only sought declaratory and injunctive relief, not compensation. As such, Knick could not have "been denied compensation" as part of that action. *Williamson Cty.*, 473 U.S. at 195; *see Bd. of Supervisors of Shenango Twp. v. McClimans*, 597 A.2d 738, 742 n.5 (Pa. Commw. Ct. 1991) ("[A]ny claim for monetary damages is not properly before this Court and must be pursued under the provisions of the Eminent Domain Code."). Furthermore, the claims for injunctive relief presented to the state court (such as Knick's due-process challenge) are no longer before us. Even if they were, they would not be subject to *Williamson County* exhaustion. *Cty. Concrete*, 442 F.3d at 168-69.[12]

Accordingly, we conclude that Knick's earlier state lawsuit did not constitute exhaustion of state-law compensation remedies for purposes of *Williamson County*'s second prong.

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[12] Knick also argues that her state-court action was proper under *Weinberg v. Comcast Cablevision of Phila., L.P.*, 759 A.2d 395 (Pa. Super. Ct. 2000). But in that case, the plaintiff claimed that a legislative act stripped access to the "elaborate procedures" in the Eminent Domain Code for assessment of damages. *Id.* at 400. Knick has not alleged that inverse-condemnation remedies are unavailable here.

C

Finally, Knick argues that *Williamson County* is a prudential doctrine, and we may therefore overlook it in appropriate cases. We decline to do so here.

Knick's initial premise is correct: *Williamson County*'s requirements are prudential. *See Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 (2013). But "merely because exhaustion requirements are prudential does not mean that they are without teeth. Even prudential exhaustion requirements will be excused in only a narrow set of circumstances." *Wilson v. MVM, Inc.*, 475 F.3d 166, 175 (3d Cir. 2007).

Several of our sister circuits have declined to enforce *Williamson County*'s requirements based on the equities presented in individual cases. Knick relies primarily on *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013), and its companion case *Town of Nags Head v. Toloczko*, 728 F.3d 391 (4th Cir. 2013). In *Sansotta*, the Fourth Circuit overlooked *Williamson County* because the defendant removed the action to federal court, thwarting the plaintiff's effort to exhaust. The defendant's "manipulation" provided strong equitable reasons to overlook exhaustion. *Sansotta*, 724 F.3d at 545; *see also Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014). In *Toloczko*, the property owner was a *defendant* in an action brought by the state to compel the demolition of their property. The property owners removed the action to federal court, and only then asserted counterclaims under the Takings Clause. The Fourth Circuit noted that, if the owner was required to go back to state court, they would have been subjected to "piecemeal litigation" in two forums at once. 728 F.3d at 399 (quoting *San Remo Hotel*, 545

U.S. at 346); *see also Horne*, 133 S. Ct. at 2063-64 (holding that petitioners could raise a takings defense in an enforcement action).

For another example, the Ninth Circuit declined to enforce *Williamson County* in *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (en banc). First, the Court rejected the claim on the merits, "so it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation." *Id.* at 1118. Second, the Court noted that "the law changed after their trip to state court," and "it is hard to see any value in forcing a second trip on them." *Id.*

Knick does not argue that inverse-condemnation proceedings would be unavailable or futile. Instead, she argues that allowing her claims to proceed would be more efficient and would avoid piecemeal litigation. But because Knick's Just Compensation Clause claims are all that remain in the case, there is no risk of piecemeal litigation comparable to *Toloczko*. Nor has Knick identified any exceptional circumstance—such as the Township thwarting her access to inverse-condemnation proceedings as in *Sansotta*, or a change in applicable law after state-court proceedings concluded as in *Guggenheim*. Even if it were more efficient to allow Knick's claims to proceed, that would be true in *any* case where a litigant asks a court to waive her failure to meet a prudential requirement.

Finally, the Ninth Circuit declined to enforce *Williamson County* because it was more efficient to simply reject the property owner's claims on the merits. *Guggenheim*, 638 F.3d at 1118; *see also MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1130 (9th Cir. 2013). While we do not rule on the merits here, we note that Knick's claims do not suffer from any obvious infirmities that would tempt us to follow the Ninth Circuit's example. Knick relies on a straightforward application of the Supreme Court's decision in *Nollan v. California Coastal Commission*, which found it "obvious" that an easement for public access across private property constituted a permanent physical taking. 483 U.S. 825, 831 (1987); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). The fact that the Ordinance only mandates public access during daylight hours does not change the fact that land must be accessible every day, indefinitely. *See Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012) (noting that, in *United States v. Cress*, 243 U.S. 316 (1917), "'inevitably recurring'" flooding created a permanent condition on the land, which "gave rise to a takings claim no less valid than the claim of an owner whose land was continuously kept under water"); *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) ("[T]he concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted.").

In sum, even prudential requirements should not be lightly cast aside. We think there is "value in forcing a second trip" to state court here. *Guggenheim*, 638 F.3d at 1118. The Commonwealth's inverse-condemnation mechanism is better equipped to value Knick's land than the federal courts, and litigants must be incentivized to pursue relief through proper channels. Accordingly, we will affirm the District Court's order dismissing the takings claims without prejudice pending exhaustion of state-law compensation remedies.

V

For the foregoing reasons, we will affirm the judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FILED 9/8/2016

ROSE MARY KNICK,

Plaintiff,

v.

SCOTT TOWNSHIP,

Defendant.

CIVIL ACTION
NO. 3:14-CV-02223

(JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is a Motion to Dismiss Plaintiff Rose Mary Knick's Second Amended Complaint ("SAC," Doc. 21) filed by Defendant Scott Township. Plaintiff's SAC asserts claims for damages under 42 U.S.C. § 1983 for an unlawful search and seizure of her property in violation of the Fourth Amendment, and an unlawful physical taking of her property without just compensation in violation of the Fifth and Fourteenth Amendments. Additionally, Plaintiff seeks a declaratory judgment declaring the Scott Township Ordinance No. 12-12-20-001 unconstitutional, and a temporary restraining order as well as preliminary and permanent injunctive relief against Scott Township's enforcement of said Ordinance. Because this Court previously dismissed Plaintiff's Fourth Amendment claims, Defendant's Motion to Dismiss Plaintiff's Fourth Amendment claims will be GRANTED. Because Plaintiff's takings claims are not ripe for review in federal court, Defendant's Motion to Dismiss Plaintiff's Fifth and Fourteenth Amendment claims will be GRANTED. Accordingly, because Plaintiff's takings claims are not ripe for review, Defendant's Motion to Dismiss Plaintiff's claims for declaratory, injunctive, and other additional relief will be GRANTED.

I. Background

The facts as set forth in Plaintiff's Complaint are as follows:

Plaintiff, Rose Mary Knick, is a resident of Scott Township, Pennsylvania. (SAC ¶ 5, Doc. 21.) Scott Township, the only defendant named in Plaintiff's SAC, is a political subdivision of the Commonwealth of Pennsylvania, organized and designated as a Township of the Second Class. (SAC ¶ 6.) Ms. Knick owns approximately 90 acres of real estate, comprised of two parcels, located at 49 Country Club Road, in Scott Township, Pennsylvania. (*Id.* ¶¶ 5, 7.) The property has been continuously owned and occupied by Ms. Knick and her family members since 1970. (*Id.* ¶ 7.) The property has been used as a primary residence, as well as farmland and grazing areas for horses, cattle and other farm animals. (*Id.*) There are "No Trespassing" signs placed at regular intervals and the property is bounded by stonewalls, fences and other boundary markers. (*Id.* ¶ 8.)

Ms. Knick frequently attends meetings of the Scott Township Board of Supervisors ("Supervisors") and regularly confronts the Supervisors and administrative officials with respect to the expenditure of funds, tax revenue issues, and municipal decisions. (*Id.* ¶ 9.)

In September 2008, at several public meetings and in response to a citizen inquiry, the Supervisors and the Township Solicitor discussed the alleged existence of an ancient burial ground on Ms. Knick's property. (*Id.* ¶ 10.) In 2008 and early 2009, Ms. Knick, as well as her counsel at the time, made a Right-to-Know request of the Supervisors. (*Id.* ¶ 11.) The request sought particulars regarding the suggestion that an ancient burial ground was on her property. (*Id.*) Ms. Knick and her counsel also advised the Supervisors that there was no designation in the chain of title to her property regarding a burial ground or cemetery and also that there was no physical evidence of the existence of a burial ground or cemetery. (*Id.*) Ms. Knick's attorney provided Scott Township, through their solicitor, a correspondence dated October 23, 2008, reiterating that there was no designation of a burial ground or cemetery in the chain of title nor any evidence of such on Ms. Knick's property. (*Id.* ¶ 13.)

In December 2012, the Supervisors enacted Ordinance No. 12-12-20-001 ("Cemetery Ordinance" or "Ordinance"). (SAC ¶ 14.) The Ordinance addresses the operation and maintenance of cemeteries and burial grounds within Scott Township. (*Id.*) The Supervisors determined that the Ordinance would be applied to Ms. Knick and her property. (*Id.* ¶ 19.)

On April 10, 2013, after a collective determination by the Supervisors, a Scott Township Code Enforcement Agent entered Ms. Knick's property without permission and without an administrative warrant. (*Id.* ¶ 20.) On April 11, 2013, Scott Township issued a Notice of Violation alleging that Ms. Knick's property was in violation of the

Ordinance. (*Id.* ¶ 21.) On or about May 7, 2013, Ms. Knick filed a complaint in the Lackawanna County Court of Common Pleas seeking declaratory and injunctive relief requesting the court: (1) declare the Ordinance unconstitutional; (2) prohibit Defendant from enforcing the Ordinance; (3) grant Ms. Knick preliminary and permanent injunctive relief; and (4) grant other appropriate relief, including attorneys' fees. (*Id.* ¶ 23.) Ms. Knick, through counsel, provided Scott Township with notice regarding the presentation of an Emergency Motion for Injunctive Relief on or about May 7, 2013. (*Id.* ¶ 24.) In response, the parties agreed and stipulated to an order that stayed enforcement proceedings against Plaintiff. (*Id.*) A hearing was subsequently held on October 8, 2014 in the Lackawanna County Court. (*Id.* ¶ 25.) Following the hearing, Judge John Braxton issued an Order concluding that the court was an improper venue because the case was "not in the proper posture for a decision to be rendered on the Plaintiff's requested forms of relief." (*Id.*) On October 31, 2014, the Supervisors issued another Notice of Violation alleging Ms. Knick's noncompliance with the Ordinance. (*Id.* ¶ 26.) Ms. Knick filed a Petition for Contempt of Court in the Lackawanna County Court of Common Pleas. (*Id.* ¶ 28.) After a hearing, Judge Terrance Nealon denied the Petition for Contempt and entered a Memorandum and Order, which effectively lifted the stay that had previously been entered. (*Id.*) The Lackawanna County Court of Common Pleas has not yet addressed Ms. Knick's request for Declaratory Relief. (*Id.*)

Ms. Knick subsequently initiated her federal action in this Court on November 20, 2014. (Pl.'s Original Compl., Doc. 1.) Ms. Knick's First Amended

Complaint sought damages under 42. U.S.C. § 1983 against Scott Township for violations of her Fourth Amendment rights, alleging the Township maintained a policy, practice, custom or procedure permitting illegal searches of private property. (Pl.'s First Am. Compl. ¶ 26, Count I, Doc. 9.) Additionally, Ms. Knick alleged that the Township failed to adequately train the Code Enforcement Official, (*id.* ¶¶ 30-33, Count II), and sought relief from the Code Enforcement Official in his official and individual capacity under § 1983, (*id.* ¶¶ 35-39, Count III.) On March 2, 2015, Defendant filed a motion to dismiss Plaintiff's First Amended Complaint. (Def.'s First Mot. to Dismiss, Doc. 10.) After considering Defendant's motion, this Court granted Defendant's motion and dismissed Counts One, Two, and Three of Plaintiff's First Amended Complaint with prejudice. (Order Granting Def.'s Mot. to Dismiss, Doc. 20.)

Ms. Knick's First Amended Complaint also claimed violations of her First, Fourth, Fifth, and Fourteenth Amendment rights under 42 U.S.C. § 1983 stemming from Scott Township's enactment of the Cemetery Ordinance (Pl.'s First Am. Compl. ¶ 41, Count IV.) Ms. Knick additionally requested a declaratory judgment declaring the Ordinance unconstitutional as well as a temporary restraining order and preliminary and permanent injunctive relief. (*Id.* ¶¶ 44-47, Count V.) After considering the parties' briefs, this Court granted Defendant's motion to dismiss Count Four without prejudice, and provided Plaintiff a twenty-one (21) day window to file an amended pleading. This Court also granted Defendant's motion to dismiss Count Five without prejudice.

Plaintiff subsequently filed a Second Amended Complaint ("SAC") within the prescribed time frame. (SAC, Doc. 21.) Defendant responded to Plaintiff's SAC by filing the pending Motion to Dismiss for failure to state a claim. (Def.'s Second Mot. to Dismiss, Doc. 22.) Plaintiff filed a Brief in Opposition to Defendant's Motion to Dismiss, (Pl.'s Br. in Opp'n, Doc. 26), and Defendant filed a Reply Brief in support of the pending Motion, (Def.'s Reply, Doc. 27.)

Plaintiff's SAC alleges Fourth, Fifth, and Fourteenth Amendment violations. (*See* SAC, Doc. 21.) However, because this Court already dismissed Plaintiff's Fourth Amendment claims with prejudice, the only live constitutional claims before the Court are Plaintiff's facial and as-applied takings claims under the Fifth and Fourteenth Amendments.[1]

II. Discussion

A. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion, the Court's role is limited to determining if a plaintiff is entitled to offer evidence in support of her claims. *See Semerenko v. Cendant Corp.*, 223 F.3d 165, 173 (3d Cir. 2000). The Court does not consider whether a plaintiff will ultimately prevail. *Id.* A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. *See Gould Elecs. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000).

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[1] In their briefs, the parties agreed that the only claims in issue in Plaintiff's SAC are the Takings Clause claims. (*See* Pl.'s Br. in Opp'n 1; Def.'s Reply 2.)

A pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The statement required by Rule 8(a)(2) must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Detailed factual allegations are not required. *Twombly*, 550 U.S. at 555. However, mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Instead, a complaint must "show" this entitlement by alleging sufficient facts. *Id.* While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009). As such, "[t]he touchstone of the pleading standard is plausability." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012).

The inquiry at the motion to dismiss stage is "normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

In deciding a motion to dismiss, the Court should consider the complaint, exhibits attached to the complaint, and matters of public record. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (citing *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Pension Benefit Guar. Corp.*, 998 F.2d at 1196. The Court need not assume that the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998), or credit a complaint's "'bald assertions'" or "'legal conclusions,'" *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997)).

B. Count I: Plaintiff's Fourth Amendment Warrantless Search Claim

Count I of Plaintiff's SAC claims Defendant violated her Fourth Amendment rights under 42 U.S.C. § 1983 by conducting a warrantless search of her property pursuant to a Township policy, practice, custom, or procedure. (SAC ¶¶ 30-31, Doc. 21.) This Court already dismissed Plaintiff's Fourth Amendment claims with prejudice. (*See* Order Granting Def.'s Mot. to Dismiss, Doc. 20.) Plaintiff acknowledged that this Court already dismissed her Fourth Amendment claims with prejudice. (*See* Pl.'s Br. in Opp'n 1 n.1.) Consequently, Defendant's Motion to Dismiss Count I of Plaintiff's SAC will be GRANTED.

C Count II: Plaintiff's Fourth Amendment Seizure and Takings Clause Claims

Count II of Plaintiff's SAC seeks relief under 42 U.S.C. § 1983, asserting that Defendant seized Plaintiff's property in violation of the Fourth Amendment and executed an uncompensated physical invasion taking in violation of the Fifth and Fourteenth Amendments. For the reasons detailed above, Plaintiff's Fourth Amendment seizure claim has already been dismissed with prejudice. (*See* Order Granting Def.'s Mot. to Dismiss, Doc. 20.) Accordingly, Defendant's Motion to Dismiss Plaintiff's Fourth Amendment seizure claim will be GRANTED.

For the reasons detailed below, Plaintiff's facial and as-applied takings claims will be dismissed without prejudice because Plaintiff failed to exhaust available state law remedies.

The Takings Clause of the Fifth Amendment, applicable to the states via the Fourteenth Amendment, prohibits the government from taking private property for public use without providing just compensation. *See Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 370 (3d Cir. 2012). "To state a takings claim, Plaintiff must prove that (i) private property (ii) has been taken for (iii) public use (iv) without just compensation." *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 804 (D.N.J. 1993). Takings claims generally fall into two categories: physical and regulatory. *See Yee v. City of Escondito*, 503 U.S. 519, 522-23 (1982). Because Plaintiff's SAC alleges a physical invasion taking, (SAC ¶ 36, Doc. 21), this Court need not review the elements of a regulatory taking. A physical invasion taking occurs when there is either a condemnation or a physical appropriation of property. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). An ordinance therefore amounts to a physical invasion taking in violation of the Takings Clause "where government requires an owner to suffer a permanent physical invasion of her property" and fails to provide just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (internal citations omitted); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (holding that a physical invasion taking occurs when "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises").

1. *Williamson County* Ripeness Requirements

But before a federal court may address the merits of a Takings Clause claim, plaintiffs generally must satisfy unique ripeness requirements. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 194-95 (1985). As this Court previously explained, the Takings Clause inquiry depends on whether a plaintiff asserts a facial or as-applied challenge. An as-applied challenge generally is not ripe until two prerequisites are satisfied: "(1) 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue' (the 'finality rule'), and (2) the plaintiff has unsuccessfully exhausted the state's procedures for seeking 'just compensation,' so long as the procedures provided by the state were adequate." *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) (citing *Williamson Cty.*, 473 U.S. at 186, 194-95 (1985)).

Unlike an as-applied challenge, a facial challenge brought under the Takings Clause need not satisfy the "finality rule." *See Cty. Concrete Corp.*, 442 F.3d at 168. However, plaintiffs asserting a facial challenge still must satisfy *Williamson County*'s "exhaustion" requirement and "seek just compensation from the state before claiming that their right to just compensation under the Fifth Amendment has been violated," so long as adequate state procedures exist. *Id.*; *see also Cowell v. Palmer Twp.*, 263 F.3d 286, 290-91 (3d Cir. 2001) (holding that Pennsylvania state law provides an adequate procedure for aggrieved parties seeking just compensation for an alleged taking). In accordance with the *Williamson County* ripeness test, this Court is unable to reach the merits of Plaintiff's SAC at this time because Plaintiff has failed to satisfy the state procedure exhaustion requirement. Therefore, as detailed below, Plaintiff's claim is not ripe for federal review and will be dismissed without prejudice.

2. Plaintiff's Facial Challenge Does Not Satisfy the *Williamson County* Exhaustion Requirement

Plaintiff mounts both a facial and as-applied challenge to Defendant's Cemetery Ordinance, alleging that the Ordinance constitutes a physical invasion taking without just compensation in violation of the Fifth and Fourteenth Amendments. (SAC ¶ 36, Doc. 21.) Specifically, Plaintiff alleges that the Cemetery Ordinance constitutes a facial violation of the Takings Clause in two ways: (1) by authorizing the Township's agents to enter private land to determine whether a cemetery exists on that property (the "government access provision"); and (2) by authorizing the general public to enter all land subject to the Cemetery Ordinance (the "public access provision"). (*See* Pl.'s Br. in Opp'n 7, 11, Doc. 26.) Plaintiff asserts a physical taking, not a regulatory taking. (SAC ¶ 36.) Therefore, contrary to much of Defendant's Reply Brief, this Takings Clause inquiry does not turn on whether the challenged Ordinance deprives Plaintiff of "all economically beneficial use" of the property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). Rather, the question is whether a "'permanent physical occupation' of the property, by the government itself or by others," has occurred. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32

(1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982)).

However, irrespective of whether Plaintiff states plausible grounds for a physical invasion taking of her property without just compensation, this Court is unable to reach the merits of Plaintiff's claim because Plaintiff failed to satisfy the *Williamson County* exhaustion requirement. The Third Circuit has clearly ruled that plaintiffs asserting either a facial or as-applied Just Compensation claim against a state or local government in federal court have a "duty to seek compensation from the state before claiming that their right to just compensation under the Fifth Amendment has been violated," so long as adequate state procedures exist for pursuing just compensation. *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 168 (3d Cir. 2006); *see also Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 406 (9th Cir. 1996) ("Thus, even if a zoning ordinance, on its face, 'takes' property for Fifth Amendment purposes, no constitutional violation occurs until the state refuses to justly compensate the property owner. Indeed, we have found that landowners who assert their property has been *physically* taken must first seek compensation from the state before turning to a federal forum.") (emphasis in original); *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 806 (D.N.J. 1993) ("[U]ntil a plaintiff has sought just compensation, there is no case or controversy. 'Where just compensation is available, a taking is not unconstitutional.' Thus, until a plaintiff has availed itself of a state's 'adequate process for obtaining compensation,' the plaintiff has suffered no harm and has no federal cause of action.") (citations omitted).

Pennsylvania state law provides for a process "through which a landowner may seek just compensation for the taking of property." *Cowell v. Palmer Twp.*, 263 F.3d 286, 290 (3d Cir. 2001) (citing Pennsylvania's Eminent Domain Code); *see also Gould v. Council of Bristol Borough*, 2014 WL 296944, at *7 (E.D. Pa. Jan. 27, 2014) (holding that plaintiff could not pursue a Takings Clause claim until he first pursued the state law remedy contained in Pennsylvania's Eminent Domain Code); *cf. Kruse v. Vill. of Chagrin Falls*, 74 F.3d 694 (6th Cir. 1996) (permitting relief in federal court because, *inter alia*, state law failed to provide an adequate procedure for securing just compensation). The Third Circuit has concluded that the just compensation procedure contained in Pennsylvania's Eminent Domain Code is constitutionally adequate. *See Cowell*, 263 F.3d at 290; *Tripodi v. N. Coventry Twp.*, 2013 WL 4034372, at *9 (E.D. Pa. Aug. 8, 2013) ("The Third Circuit Court of Appeals has deemed exhaustion of these [Pennsylvania state law] procedures a prerequisite to filing a federal claim alleging a taking without just compensation.") (citing *Cowell*). Accordingly, Plaintiff is required to first exhaust the available state procedure for obtaining just compensation before her claim may be heard in federal court.[2]

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[2] Plaintiff brought her Takings Clause claims under 42 U.S.C. § 1983, which generally does not require a plaintiff to exhaust administrative remedies before bringing suit. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192 (1985) (citing *Patsy v. Fla. Bd. of Regents*, 457 U.S. 496 (1982)). However, the Third Circuit has explained that "the second prong of *Williamson*'s ripeness test merely addresses a unique aspect of Just Compensation Takings claims," and is not a "true 'exhaustion of state remedies' requirement." *Cty. Concrete Corp.*,

Because Pennsylvania law provides aggrieved parties with an adequate procedure for obtaining just compensation, Plaintiff's takings claims are ripe for review in federal court only if she first attempts to avail herself of the state's just compensation determination process. However, Plaintiff has not pursued the state's procedures for obtaining just compensation. Although Plaintiff did file a state court action prior to her current federal lawsuit, the state court action did not petition the court to initiate the process for ascertaining and awarding just compensation per the Pennsylvania Eminent Domain Code. *See* 26 PA. CONS.. STAT. ANN. §§ 101-1106. Specifically, Plaintiff's state court claims never requested "the appointment of viewers to ascertain just compensation," *id.* § 502(6), and the record does not show any state court order granting or denying Plaintiff's petition for the appointment of viewers, *see id.* §§ 502(c)(1)-(2). Although Plaintiff's original state court complaint generally alleged a takings claim (among other claims), nothing in the record demonstrates, and Plaintiff does not contend in her SAC, that she first pursued the available state law just compensation recourse before turning to the federal courts. *Cf., e.g., In re Property Along Pine Road in Early Twp.*, 743 A.2d 990 (Pa. Commonw. 1999) (plaintiffs alleging an uncompensated taking specifically requested the appointment of viewers, per the Pennsylvania Eminent Domain Code); *Gross v. City of Pittsburgh*, 741 A.2d 234 (Pa. Commonw. 1999) (same). Because both a facial and as-applied Takings

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442 F.3d at 168. Accordingly, asserting a Takings Clause claim under § 1983 does not circumvent the need to satisfy the second prong of *Williamson County*'s ripeness test.

Clause claim does not present a "case or controversy" unless and until a "plaintiff has sought and been denied just compensation," the federal court system is unable to address Ms. Knick's takings claim until she first attempts to secure just compensation from the state via Pennsylvania's Eminent Domain Code. *See Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 806 (D.N.J. 1993); *id.* at 807 ("Plaintiff's takings claim will not be ripe until Plaintiff has sought just compensation in state court."). Accordingly, Defendant's Motion to Dismiss Count II of Plaintiff's SAC will be GRANTED because the takings claims are not ripe for review in federal court. Plaintiff's Fifth and Fourteenth Amendment claims will be dismissed without prejudice.

D. Count III: Plaintiff's Request for a Declaratory Judgment and Injunctive Relief

Count III of Plaintiff's SAC requests a declaratory judgment declaring the Cemetery Ordinance unconstitutional, as well as a temporary restraining order and preliminary and permanent injunctive relief prohibiting Defendant from enforcing the Ordinance. (SAC ¶¶ 45-53, Doc. 21.). This Court previously denied Plaintiff's request for this particular relief. (*See* Order Granting Def.'s Mot. to Dismiss, Doc. 20.) Because the takings claims now before the Court are not ripe for review, this Court will decline to issue declaratory and/or injunctive relief. *See Carteret Sav. Bank, F.A. v. Office of Thrift Supervision*, 963 F.2d 567, 582-84 (3d Cir. 1992) (concluding that a plaintiff generally cannot receive equitable relief for a takings claim so long as an adequate procedure exists for awarding just compensation); *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F. Supp. 790, 806 (D.N.J. 1993) ("[T]he federal takings cases and *Williamson* teach that a plaintiff cannot bring a takings claim in federal district court, *whether for injunctive relief or damages*, until the plaintiff has sought and been denied just compensation . . . . [U]ntil a plaintiff has sought just compensation, *there is no case or controversy*.") (emphases added); *CBS Outdoor Inc. v. N.J. Transit Corp.*, 2007 WL 2509633, *12 (D.N.J. Aug. 30, 2007) ("Plaintiffs cannot avoid *Williamson*'s exhaustion of state procedures requirement by declining to categorize their claims as ones for just compensation. The Takings Clause primarily concerns itself with ensuring just compensation and is not violated until just compensation is denied. Plaintiffs also cannot utilize the Declaratory Judgment Act to backdoor their takings claim into federal court without first complying with the Supreme Court's directives and utilizing state compensatory procedures."). Accordingly, Defendant's Motion to Dismiss Count III of Plaintiff's SAC will be GRANTED. Plaintiff's claims in Count III will be dismissed without prejudice.

III. Conclusion

For the above stated reasons, Plaintiff's Fourth Amendment claims against Defendant contained in Counts I and II will be DISMISSED with prejudice. Plaintiff's takings claims under the Fifth and Fourteenth Amendments contained in Count II will be DISMISSED without prejudice. Plaintiff must first attempt to avail herself of Pennsylvania's just compensation procedures before she may re-file these takings claims in federal court. Plaintiff's claims for declaratory and injunctive relief contained in Count III will be **DISMISSED** without prejudice.

An appropriate order follows.

September 7, 2016	/s/ A. Richard Caputo
Date	A. Richard Caputo United States District Judge

FILED 7/6/2017

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-3587

ROSE MARY KNICK,
Appellant

v.

TOWNSHIP OF SCOTT;
CARL S. FERRARO, Individually and in his Official Capacity as Scott Township Code Enforcement Officer

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 3-14-cv-02223
District Judge: The Honorable A. Richard Caputo

Argued April 25, 2017

Before: SMITH, *Chief Judge*,
McKEE, and RENDELL, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was argued on April 25, 2017.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered September 8, 2016, be and the same is hereby AFFIRMED. The parties shall bear their own costs. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron
Clerk

DATED: July 6, 2017

No. 17-647

IN THE

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether there is any compelling reason to grant the Petition and reconsider *Williamson County*'s state procedures requirement, where this Court has repeatedly upheld that requirement, decades of case law have applied it, the requirement is consistent with the Fifth Amendment and principles of federalism, this Court has recently denied certiorari in response to the same arguments, and where this case would be a particularly inappropriate one for any reconsideration of *Williamson County*.

2. Whether there is any compelling reason to grant the Petition and reconsider *Williamson County*'s state procedures requirement, where there is no "circuit split" as alleged by Petitioner.

3. Whether there is any compelling reason to grant the Petition and reconsider *Williamson County*'s state procedures requirement, where the Third Circuit's opinion is fully consistent with this Court's jurisprudence.

CORPORATE DISCLOSURE STATEMENT

Scott Township is a subdivision of Lackawanna County, in the Commonwealth of Pennsylvania. The Township has no parent corporation or corporate stock.

LIST OF PARTIES

Carl S. Ferraro is no longer interested in this matter.

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Sup. Ct. R. 10 1

INTRODUCTION

There are no compelling reasons to grant the Petition for Writ of Certiorari. *See* Sup. Ct. R. 10. There is no conflict between the Third Circuit's decision and this Court's decision in ***Williamson County Regional Comm'n v. Hamilton Bank***, 473 U.S. 172 (1985), and there is no conflict among the Circuit courts as to the application of ***Williamson County*** to claims like this one, in which Petitioner is seeking just compensation for a taking.

In ***Williamson County***, this Court held that a claim alleging a Fifth Amendment taking becomes ripe only after (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the plaintiff has unsuccessfully exhausted the state's procedures for seeking just compensation, so long as the provided procedures by the state are adequate. It is undisputed that Pennsylvania law provides complete and adequate procedures for compensation, and that Petitioner chose not to pursue them. Petitioner instead seeks to avoid or invalidate the state exhaustion requirement.

Petitioner's arguments seeking to overturn ***Williamson County***, and the decades of precedent applying it, misapprehend the case law and conflate two distinct concepts, as the Third Circuit's thorough opinion explains. This case would be a particularly inappropriate one to seek reversal of ***Williamson County*** in any event, because Petitioner's speculative, theoretical criticisms of ***Williamson County*** relate to factual scenarios not present here.

This Court has consistently upheld ***Williamson County***'s state litigation requirement and denied certiorari in cases making the same arguments against ***Williamson County***, most recently on October 30, 2017, just over two months ago. ***See Wayside Church v. Van Buren County***, 2012 U.S. LEXIS 6615 (October 30, 2017). This Petition should likewise be denied.

COUNTERSTATEMENT OF THE CASE

This is one of two cases brought by Petitioner Rose Mary Knick against the Township of Scott, in Lackawanna County, Pennsylvania. The Township enacted an ordinance regulating cemeteries on public and private property, including one on Knick's property. Knick sued the Township in state court, challenging the ordinance, but has not pursued that case or sought compensation in the state court. Knick also filed this federal case, claiming that she is entitled to just compensation on the basis that the ordinance constitutes a taking under the Fifth and Fourteenth Amendments.

The District Court (the Honorable A. Richard Caputo) dismissed Knick's Takings claim as unripe, because Pennsylvania law provides a constitutionally adequate process for obtaining just compensation for the taking of property, and Knick failed to pursue that process. (*See* Appendix B).[1] The Third Circuit affirmed in a unanimous published opinion authored by Chief Judge D. Brooks Smith. (*See* Appendix A).

Petitioner has now filed a Petition for Writ of

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[1] The Appendix references are to the Appendices to Knick's Petition for Writ of Certiorari.

Certiorari. Petitioner still has not pursued compensation in state court.

I. Relevant Facts

Petitioner Knick owns approximately 90 acres of property in Scott Township, with a residence, farmland and grazing areas. (B-2). After a citizen inquiry in 2008, the Township Supervisors discussed the existence of an alleged ancient burial ground on Petitioner's property.[2] (B-3). In 2012, the Township enacted an ordinance ("the Cemetery Ordinance") addressing the operation and maintenance of cemeteries. (A-2). The Cemetery Ordinance applies to public and private cemeteries, and requires that cemeteries be properly maintained and accessible to the public. (A-2, 3). In 2013, Petitioner was determined to be in violation of the Cemetery Ordinance. (A-4).

II. Procedural History

A. The State and Federal Pleadings

In May 2013, Petitioner filed a complaint for declaratory and injunctive relief in the Lackawanna County Court of Common Pleas. Petitioner asked the state court to declare the Cemetery Ordinance unconstitutional, to prohibit and enjoin the Township from enforcing it, and to award her other relief including attorneys' fees. (A-4). However, after the state court ruled in October 2014 that the case was not in the proper posture for the relief requested by Petitioner (A-4, 5), Petitioner did not seek any further relief in that case, which remains pending (Lackawanna County No. 2013-CV-2309). Petitioner also did not pursue an inverse-condemnation proceeding against the Township as provided for under Pennsylvania's Eminent Domain Code. (A-5).

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[2] Scott Township residents Robert Vail, Jr., and his father, Robert Vail, Sr., identified the tombstones of their relatives, including their ancestor and Revolutionary War veteran Micah Vail, on the Knick property. *See* http://thetimes-tribune.com/news/cemetery-dispute-heads-to-federal-court-1.1808245 (last visited December 30, 2017).

Instead, in November 2014, Petitioner filed this suit against the Township in the United States District Court for the Middle District of Pennsylvania, alleging multiple violations of her First, Fourth, Fifth and Fourteenth Amendment rights under 42 U.S.C. § 1983. (A-5). After motions to dismiss and amendments, Petitioner's only remaining claim was her claim seeking compensation for the alleged taking under the Fifth and Fourteenth Amendments. (B-6; A-5, 6).

B. The District Court's Dismissal

The District Court granted the Township's motion to dismiss Petitioner's Takings Clause claims. (Appendix B, Memorandum Decision and Order of September 7, 2016). The District Court noted that such claims must satisfy "unique ripeness requirements" under ***Williamson County***. (B-11). Relevant here, plaintiffs must seek just compensation from the state before claiming that their right to just compensation under the Fifth Amendment has been violated, as long as the state provides adequate procedures for compensation. (B-11). Pennsylvania law provides compensation procedures through its Eminent Domain Code, and those procedures have been held to be constitutionally adequate. (B-14). Because Petitioner failed to satisfy the state procedure exhaustion requirement, her Takings claim was not ripe for federal review, and the District Court dismissed it without prejudice. (B-12, 16-18).

C. The Third Circuit's Affirmance

Petitioner appealed, arguing that her Takings claim was a "facial" Takings claim that was exempt from the exhaustion requirement. (A-21). The Third Circuit rejected that argument and affirmed the District Court's dismissal. The Third Circuit explained that this Court has used the word "facial" in two conceptually distinct ways: to describe a type of "taking" where the mere enactment of a provision itself constitutes a taking, and to describe a type of legal challenge that seeks to invalidate a taking rather than obtain just compensation. (A-23).

Petitioner's argument failed to distinguish between facial takings and facial challenges. A facial taking does not violate the Fifth Amendment unless it is uncompensated. (A-23, 24). A facial challenge, on the other hand, does not seek compensation; it attacks the underlying validity of the law, an issue that "arises logically and temporally prior to the denial of compensation," so "there is no reason to wait for compensation to be denied; the constitutional violation would occur at the moment the invalid statute or regulation becomes effective." (A-24).

Importantly, Petitioner's claims were not facial challenges; rather, they were "unavoidably, claims for compensation." (A-26; *see also* A-27-28, quoting Petitioner's Second Amended Complaint). Petitioner's argument that the Ordinance was invalid because it did not provide a self-contained mechanism for compensating property owners was rejected in *Williamson County*: "[T]he Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." (A-28, quoting *Williamson County*, 473 U.S. at 194). Accordingly, Petitioner's claims under the Just Compensation Clause were subject to *Williamson County*'s exhaustion requirement, and were properly dismissed.[3]

REASONS FOR DENYING THE PETITION

Petitioner recites the same arguments seeking reversal of *Williamson County* that this Court unanimously rejected two months ago in *Wayside Church v. Van Buren County*, 2017 U.S. LEXIS 6615 (Petition for Writ of Certiorari denied October 30, 2017). This Court also denied petitions attempting to avoid *Williamson County* in *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409, 2016 U.S. LEXIS 2830 (April 25, 2016) (with Justices Thomas and Kennedy dissenting), and in *Alto Eldorado Partnership v. Santa Fe County*, 565 U.S. 880 (October 3, 2011).[4]

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[3] The Third Circuit also rejected Petitioner's alternative arguments that she should be deemed to have complied with *Williamson County* and/or that *Williamson County's* prudential requirements should be overlooked in the interest of "efficiency"(A-28-32), and Petitioner did not pursue those arguments in her Petition.

[4] *See* 2017 U.S. S. Ct. Briefs LEXIS 2489, *36-53 (petition

This Petition should likewise be denied. This Court has reaffirmed *Williamson County*'s prudential state litigation requirement multiple times in the three decades since that case was decided. The requirement is founded in the very language of the Fifth Amendment, and is consistent with Article III's requirement of a case or controversy, with other principles of federalism, and with the recognition of the uniquely complex and local issues presented by land use regulation. Even if there were any basis to revisit *Williamson County*'s prudential requirement that state compensation procedures be pursued before a facial takings compensation claim is ripe (which is denied), this would be the wrong case to do so, because the petition asserts hypothetical concerns about *Williamson County* that simply do not exist in this case.

Petitioner's allegations of a conflict among the circuits, or between the Third Circuit's decision and this Court's jurisprudence, fail for the reasons set forth in the thorough and thoughtful opinion authored by Third Circuit Chief Judge Smith, joined by former Chief Judge Theodore A. McKee and Senior Judge Marjorie O. Rendell. That opinion correctly disposed of Petitioner's arguments, and in particular, carefully explained the distinction between claims seeking compensation for facial takings (like this case) and facial legal challenges, which do not seek compensation and thus do not require a plaintiff to seek state compensation first.

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in *Wayside Church*); 2015 U.S. S. Ct. Briefs LEXIS 4105, *23-40 (petition in *Arrigoni Enterprises*); U.S. S. Ct. No. 11-50, petition in *Alto Eldorado* filed July 8, 2011, pp. 11-16.

I. There is No Important Question to Consider: This Court Has for Decades Reaffirmed *Williamson County*'s Prudential State Litigation Requirement, has Denied Certiorari in Response to the Same *Williamson County* Arguments, and this Case Would be Particularly Inappropriate for Any Reconsideration of *Williamson County*

The Fifth Amendment does not proscribe the taking of property; it proscribes the taking of property without just compensation:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V; *see Williamson County*, 473 U.S. at 194. In *Williamson County*, this Court held that a claim for compensation on the basis that a government action had effected a taking of private property is not ripe until (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the plaintiff has unsuccessfully exhausted the state's procedures for seeking just compensation, as long as the state provides adequate procedures for doing so. *Williamson County*, 473 U.S. at 186, 194-95 (1985).

There is no dispute here that Pennsylvania's Eminent Domain Code provides Petitioner with an available, adequate compensation remedy,[5] and that she has not pursued any such remedy. Instead, Petitioner seeks to avoid that remedy by asking this Court to overrule *Williamson County*. Petitioner argues that her challenge is "facial," that "facial" takings claims are ripe without regard to state court compensation procedures, that *Williamson County*'s ripeness requirement "destroys" takings claims, and that the ripeness requirement is "doctrinally flawed and unnecessary." Each argument is meritless.

---

[5] Pennsylvania's Eminent Domain Code, 26 Pa. C.S. §§ 101-1106, provides a well-organized procedure for seeking just compensation for an alleged taking. *Cowell v. Palmer Township*, 263 F.3d 286, 290-91 (3d Cir. 2001). Section 701 of the Code mandates compensation for a taking: "A condemnee shall be

A. Petitioner is not making a "facial" challenge; rather, her claim is "unavoidably" a claim for compensation

Petitioner's Petition should be rejected for the simple reason that her challenge in this case is not "facial." Rather, as the Third Circuit recognized, Petitioner's claim is "unavoidably" one for compensation. (A-27).

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entitled to just compensation for the taking, injury or destruction of the condemnee's property, determined as set forth in this chapter. Other damages shall also be paid or awarded in this title." 26 Pa.C.S. § 701 (emphases supplied). Chapter 5 of the Code describes in detail the procedure to pursue relief through inverse condemnation proceedings for an alleged taking. Importantly, Section 102 states that the Code procedures are complete and exclusive: "This title provides a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages." 26 Pa.C.S. §102(a). *See also, e.g., York Rd. Realty Co., L.P. v. Cheltenham Twp.*, 136 A.3d 1047, 1050 (Pa. Commw. 2016) ("[W]e have held that the [Code] provides the exclusive method and practice governing eminent domain proceedings, including de facto takings[.]"); *Linde Enters., Inc. v. Lackawanna River Basin Sewer Auth.*, 911 A.2d 658, 661 (Pa. Commw. 2006) ("It is well established that the Code provides the exclusive method and practice governing eminent domain proceedings, including de facto takings.")

The Third Circuit explained that Petitioner was conflating two "conceptually distinct" uses of the word "facial": (1) facial challenges (a type of legal challenge that seeks to invalidate a statute *rather than* obtain just compensation), and (2) facial Takings (which assert a claim that a statute on its face constitutes a taking that requires payment of just compensation to the property owner). *See* Third Circuit Opinion. (A-23). The Third Circuit correctly recognized that despite Petitioner's attempt to dress up her challenge to the ordinance as a "facial" challenge, her claim was "unavoidably" one for compensation:

> Despite their being characterized as facial challenges, [Petitioner's] claims are, unavoidably, claims for compensation.
>
> [Petitioner] does not claim that the alleged taking violates the Public Use Clause. Furthermore, the District Court dismissed the due-process claims asserted in [Petitioner]'s original complaint, and [Petitioner] does not appeal that ruling. All that remains is the allegation that the Township violated the Fifth Amendment because it took [Petitioner]'s property *without compensation*.
>
> . . .
>
> To be sure, [Petitioner]'s Second Amended Complaint seeks injunctive relief. But [Petitioner] has no surviving claim that the *taking itself* was invalid, apart from the fact that she has not received compensation. The remedy for an uncompensated (but otherwise valid) taking is compensation.

(A-26-27, emphasis in original). The Petition even admits this is a claim for compensation. (*See, e.g.*, Petition at 22). Petitioner's claims "are therefore subject to exhaustion under *Williamson County*." (*Id.*, A-27).

Petitioner nevertheless continues to make the same "facial" error here, lumping these distinct concepts together and referring to the combination as "facial takings claims." (Petition at 11-12). Petitioner does not even address the Third Circuit's opinion in this regard. Petitioner's claim remains, "unavoidably," a claim for compensation, not a facial challenge to the validity of the statute, and it was properly dismissed as unripe.

B. Petitioner's criticisms of *Williamson County* misstate the reach of that case

Petitioner next argues that *Williamson County* should be reviewed because it demands that every taking claim be preceded by a state court lawsuit (*id.* at 12), "forecloses both federal and state court review" or "prevents state court review" (*id.* at 15-20), and is "doctrinally flawed and unnecessary." (*Id.* at 20-24). In *San Remo Hotel, L.P. v. City & Cnty. of San Francisco*, 545 U.S. 323, 345 (2005), this Court stated, "Petitioners have overstated the reach of *Williamson County* throughout this litigation." The same is true here.

First, *Williamson County* does not "demand" a state court lawsuit prior to the assertion of any and all challenges relating to a federal takings claim. (Petition at 12). On the contrary, *Williamson County*'s prudential state compensation requirement does not apply to cases raising facial legal challenges. In fact, that is what this

Court stated in *San Remo*: the plaintiffs were never required to "ripen" their facial challenges, which "by their nature requested relief distinct from the provision of 'just compensation,'" in state court; they could have raised them directly in federal court. *San Remo*, 545 U.S. at 344-45. *See also, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (facial challenge regarding whether a governmental action constitutes a "taking"); *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005)(state compensation requirement would not apply to determination of whether a governmental action fails to meet the "public use" requirement). *Williamson County's* state compensation requirement also does not apply where there is no state compensation process available. *Asociacion de Subscripcion Conjunta del Seguro de Responsibilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007). Moreover, as a prudential requirement, it may be excused in appropriate circumstances as a matter of discretion. *See, e.g., Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014).

Second, *Williamson County* does not "destroy" takings claims. Petitioner argues that "the Full Faith and Credit statute [sic] bars federal courts from hearing a case after a related state court suit," *citing San Remo*. (Petition at 16-17). However, as this Court pointed out in *San Remo*, the plaintiffs in that case were not required to submit their facial challenges to the state court; they could have litigated such challenges in the federal court from the beginning. Alternatively, they could have reserved those facial challenges, which were distinct from the compensation claims, and pursued only the latter. The plaintiffs instead chose to advance broader issues, and having "gratuitously" presented those issues to the state court, could not get a second bite at the apple by relitigating the same substantive issues in federal court. *San Remo*, 545 U.S. at 344-346. In any event, there is no preclusion issue in this case. Quite the contrary: Petitioner "did not pursue the complete and exhaustive procedure to obtain compensation[.]"(A-29, citation omitted).

This Court in *San Remo* also rejected the argument, made again by Petitioner here, that plaintiffs are entitled to a federal forum for any and all federal claims, regardless of prior litigation:

> [Petitioners] ultimately depend on an assumption that plaintiffs have a right to vindicate their federal claims in a federal forum. We have repeatedly held to the contrary. ... The relevant question in such cases is not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment.

San Remo, 545 U.S. at 343. In fact, the argument that a claimant asserting federal rights is always entitled to a federal forum has been "emphatically" rejected by this Court:

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id., *citing Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 86 (1984), and *Allen v. McCurry*, 449 U.S. 90, 93 (1980).

Petitioner's argument that removal of cases from state to federal court renders the ripeness doctrine "illusory" and leaves "many" federal takings plaintiffs "without any access to the courts" (Petition at 18-19) is speculative and meritless. A facial challenge may always be brought in federal court, as discussed above. If the plaintiff files an action seeking compensation in a state court and the case is improperly removed, it will be remanded to the state court. *See, e.g., A Forever Recovery, Inc. v. Township of Pennfield*, 2013 U.S. Dist. LEXIS 189092 (W.D. Mich. 2013) (remanding and also awarding attorneys' fees for bad faith removal), *aff'd* 606 Fed. Appx. 279 (6th Cir. 2015). Alternatively, federal courts may waive the prudential ripeness requirement — and have done so — where defendants removed state claims to federal court and then claimed they were unripe. *See, e.g., Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013). These options counter any concern about a potential for manipulation. *See Arrigoni, supra*, 136 S. Ct. at 1409 (2016) (Thomas, J., dissenting). In any event, this case does not involve removal, so this is another completely speculative argument.

Third, *Williamson County*'s longstanding ripeness requirement is not "doctrinally flawed" or "entirely unnecessary." (Petition at 20). On the contrary, it is entirely consistent with, and derived from, the Fifth Amendment itself: only a taking without just compensation violates the Amendment, so no constitutional violation can occur until that compensation has been determined. The ripeness requirement is also fully consistent with Article III's requirement limiting federal court jurisdiction to cases involving a justiciable case or controversy. *See* U.S. Const. Art. III, § 2. The ripeness requirement is consistent with other principles of federalism such as abstention: the state government entity may choose to pay for the taking, or may withdraw the regulations. *See First English Evan. Luth. Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 317 (1987).

Finally, the ripeness requirement is consistent with the recognition, as set forth in *San Remo*, that state courts are not only "fully competent to adjudicate constitutional challenges to local land-use decisions," but that "Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo*, 545 U.S. at 347. *See also Suitum, supra*, 520 U.S. at 725 at 738-39 (noting that local land-use boards characteristically possess a high degree of discretion and flexibility). Petitioner attempts to avoid that important consideration by alleging that "in almost all takings cases" the state is not the entity taking the property or compensating for it (Petition at 21), but that argument is also unavailing. If there is no applicable state compensation procedure, *Williamson County*'s requirement would not apply anyway. In any event, that argument is another "red herring" because in this case, the alleged taking was by a state entity.

For all of these reasons, the Petition does not demonstrate any basis for granting a Writ of Certiorari.

C. This Court has rejected other recent petitions making the same arguments against *Williamson County*

Petitioner's arguments in this case, and the arguments of *amici*, rehash the arguments made in other recent cases. In *Alto Eldorado Partnership v. Santa Fe County*, 565 U.S. 880 (2011), a number of local businesses and resident landowners challenged an Ordinance which required property owners to build affordable housing for the county's residents. The Tenth Circuit applied *Williamson County*'s state litigation requirement, and found that Petitioners had not exhausted their state court remedies, thereby leaving their federal takings claims unripe. This Court unanimously denied certiorari.

Similarly, in *Arrigoni Enterprises v. Town of Durham*, 136 S. Ct. 1409* (2016), a company was denied excavation permits on the basis that the specific type of excavation required was prohibited by ordinance in that zone. The company was denied injunctive relief in state court, and subsequently filed suit in the federal district court seeking compensation for the alleged taking. The district court dismissed the plaintiff's takings claims as unripe under the *Williamson County* state litigation requirements, because the plaintiff had not pursued monetary compensation pursuant to Connecticut's inverse condemnation statute. *Arrigoni Enters., LLC v. Town of Durham*, 18 F. Supp. 3d 188 (D. Conn. 2014). The plaintiff subsequently petitioned this Court, arguing that "the Court should reconsider *Williamson County*'s unworkable demand that property owners exhaust state court procedures to ripen federal takings claims." 2015 U.S. S. Ct. Briefs LEXIS 4105, *23. This Court once again denied certiorari.

Most recently, in *Wayside Church v. Van Buren County*, 2017 U.S. LEXIS 6615 (U.S., Oct. 30, 2017), the plaintiff-landowners failed to pay property taxes, and their properties subsequently became subject to forfeiture and foreclosure. *Wayside Church v. Van Buren County*, 847 F.3d 812 (6th Cir. Mich., Feb. 10, 2017). The plaintiffs did not pursue any state court remedy, claiming that there was no available remedy. The district court agreed "that no adequate state procedures existed in which Plaintiffs could challenge the alleged taking." *Id.* at 818. The Sixth Circuit reversed, finding that the plaintiffs could have brought their claims in state court, and therefore, the issue was unripe for review in federal court. *Id.* at 822. Again, the plaintiff subsequently petitioned this Court, arguing that "[t]his case raises an important issue as to whether the Court should reconsider *Williamson County*'s demand that property owners exhaust state court procedures to ripen federal takings claims." 2017 U.S. S. Ct. Briefs LEXIS 2489, at 19. Once again, this Court unanimously denied certiorari.

This case presents no more compelling interest to revisit *Williamson County* than any of the above cases. In fact, this would be a particularly inappropriate case to reconsider *Williamson County*, because the hypothetical concerns of Petitioner and the *amici* regarding *Williamson County* simply do not exist here: there was no improper removal of a state case, no danger of issue preclusion, no lack of an appropriate forum, a complete and adequate remedy available in state court, and the alleged taking is by a state entity, not a federal one. *Amici* also suggest that this Court should "clarify" the status of substantive due process claims, but this case does not present any such claims. This Court should deny certiorari.

II. There is no Conflict Among the Lower Courts Regarding the Application of *Williamson County* Ripeness Requirements to Claims for Compensation

Petitioner next argues that this Court should reconsider *Williamson County* because of what Petitioner claims is a "deep conflict" in the lower courts as to whether *Williamson County* bars "facial takings claims." *See* Petition at 24. According to Petitioner, the First, Fourth and Seventh Circuits are on one side of the purported "split." In those circuits (which she describes as "*Williamson County*-free circuits"),"takings plaintiffs" are "free to raise facial Fifth Amendment challenges in federal courts in the first instance." *See Petition* at 24-25. Petitioner puts the Sixth, Ninth and Tenth Circuits on the other side of the "split," with the Third Circuit now "siding with" them in applying *Williamson County* to "facial takings claims." Petition at 27-29.

In rejecting Petitioner's claim of conflict, the Third Circuit explained that this "seeming inconsistency" arises from the use of the word "facial" in two distinct ways. One use of "facial" refers to a legal challenge that does not seek compensation. The other use of "facial" refers to a type of taking, which does not violate the Fifth Amendment unless the plaintiff has been denied compensation. Petitioner nevertheless continues to lump these "conceptually distinct" uses together as "facial takings claims," and argues that the circuits treat such claims inconsistently.

A review of the "conflicts" alleged by Petitioner shows that there is no circuit conflict, and that the Third Circuit was correct: its decision in this case, and its prior decision in *County Concrete Corp. v. Town of Roxbury*, 442 F.3d

159 (3d Cir. 2006), are "fully compatible" with this Court's jurisprudence. In cases involving facial legal challenges, the courts do not require exhaustion of state compensation remedies. However, in cases seeking compensation for takings, the courts do require such exhaustion unless there is a reason to excuse the failure to pursue it.

The First, Fourth and Seventh Circuit cases. The cases cited by Petitioner from the First, Fourth and Seventh Circuits involved facial challenges to the statutes or regulations, claims for compensation whether the ***Williamson County*** state exhaustion requirement was unavailable or excused, or claims for compensation where Williamson County was enforced. ***See Philip Morris, Inc. v. Reilly***, 312 F.3d 24 (1st Cir. 2002) (facial challenge to regulatory takings claim); ***Asociacion de Subscripcion Conjunta del Seguro de Responsibilidad Obligatorio v. Flores Galarza***, 484 F.3d 1 (1st Cir. 2007) (plaintiff allowed to proceed in federal court without having pursued a state compensation remedy because there was no available and adequate state court remedy for the alleged taking; the court distinguished the unusual situation in that case from cases like this one, where a state proceeding for inverse condemnation is available and "[r]equiring plaintiffs to avail themselves of such a procedure before bringing a federal takings claim protects the state's opportunity to use the scheme it designed specifically to avoid constitutional injury."); ***Clayland Farm Enterprises, LLC v. Talbot County, Md.***, 672 F. App'x 240, 244 n.6 (4th Cir. 2016) (compensation claims were deemed ripe where the plaintiff had filed the case in state court, the defendant county had removed it to federal court, and "Maryland does not have a separate statutory or inverse condemnation remedy to challenge an alleged regulatory taking of property.");

Holliday Amusement Co. of Charleston South Carolina, 493 F.3d 404, 407 (4th Cir. 2007) (affirming the district court's dismissal because the plaintiff was "maintaining this suit for just compensation[,]" and "[b]eing such a suit, state procedures for the award of just compensation must be utilized."); *International Union of Operating Engineers Local 139 v. Schimel*, 863 F.3d 674 (7th Cir. 2017) (affirming that the plaintiff's challenge in that case was a pre-enforcement facial challenge, and therefore was ripe under that exception to Williamson County even though the plaintiff did not first seek just compensation in the state court); *Peters v. Village of Clifton*, 498 F.3d 727, 733 (7th Cir. 2007), *cert. denied*, 552 U.S. 1251 (2008) (affirming the district court dismissal of the plaintiff's claim as unripe because the plaintiff failed to seek compensation in the state court, and explicitly rejecting the plaintiff's argument that it would be futile to litigate in the state court: "In Illinois, inverse condemnation is a judicially recognized remedy arising out of the self-executing takings provision of the Illinois Constitution" as recognized by the Illinois Supreme Court); *Muscarello v. Ogle County Bd. of Com'rs*, 610 F.3d 416, 422 (7th Cir. 2010), *cert. denied*, 562 U.S. 1200 (2011) (affirming the district court's dismissal of the plaintiff's takings claim as unripe because the plaintiff did not pursue state compensation procedures, and in doing so, rejecting the plaintiff's attempt to couch her claim as a "facial challenge": "It is true that pre-enforcement facial challenges to the constitutionality of a law under the Takings Clause are not subject to the exhaustion requirement. ... But Muscarello's claim is not a pre-enforcement facial challenge. She has focused on the economic deprivation that she herself will suffer if and when the taking occurs – the characteristic 'as applied' challenge.").

The Fifth and Eleventh Circuit cases. The cases cited by Petitioner from the Fifth and Eleventh Circuits likewise involved facial challenges not subject to *Williamson County*'s state litigation exhaustion requirements. *See Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 286-87 (5th Cir. 2012) (even if *Williamson County* applied to a Religious Land Use and Institutionalized Persons Act ("RLUIPA") challenge to an ordinance, the finality requirement of *Williamson County* would not bar a facial challenge to an ordinance); *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla.*, 727 F.3d 1349, 1359 n.6 (11th Cir. 2013) (facial challenge to ordinance was not subject to *Williamson County*'s finality requirements).

The Third, Sixth, Ninth and Tenth Circuit cases. Finally, the case law from the Third, Sixth, Ninth and Tenth Circuits applies *Williamson County* the same way as the First, Fourth and Seventh Circuits: it does not apply to facial challenges, but does apply (unless excused) to claims for compensation. *See Wilkins v. Daniels*, 744 F.3d 409, 417 (6th Cir. 2014) (applying *Williamson County* to Just Compensation challenge, and rejecting the plaintiffs' attempt to characterize their claim as a "facial" challenge, an argument that "oversimplifies Takings Clause jurisprudence." The plaintiffs were seeking compensation for a facial taking, and therefore *Williamson County*'s state litigation requirement applied.)[6]; *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 407 (9th Cir. 1996)

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[6] The *Wilkins* court nevertheless went on to address the merits, noting that *Williamson County* ripeness is a prudential doctrine, that no jurisprudential purpose is served by delaying consideration of a claim that "clearly has no merit," and that the statute at issue did not effect a "taking." *Wilkins*, 744 F.3d at 418-19.

(facial challenge to statute as not advancing a legitimate state interest was ripe; claim that the regulations deprived him of economically viable use of his property was not ripe, because he had not sought compensation)[7]; *Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura*, 371 F.3d 1046, 1053 (9th Cir. 2004) (rejecting plaintiff's attempted to avoid *Williamson County*'s ripeness requirement by arguing that its facial takings claim did not seek compensation, but rather, sought to adjudicate "constitutionality;" this argument was "belied by [the plaintiff's] claims for damages."); *Surf and Sand, LLC v. City of Capitola*, 377 F. App'x 662, 664 (9th Cir. 2010) (rejecting the plaintiff's facial challenge to an ordinance (that it was not for a "public use"), and holding that the facial takings claim was not ripe because the plaintiff had not pursued compensation in state court or alleged that the state remedies were deficient).

The last Tenth Circuit case Petitioner cites, *Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011), *cert. denied* 565 U.S. 880 (2011), warrants particular mention here, because the Tenth Circuit rejected the same arguments being made here in seeking to avoid *Williamson County*'s ripeness requirement, and this Court unanimously denied certiorari. The plaintiff-developers in *Alto Eldorado* alleged that their challenge was a "facial" one in that they were arguing that the regulation at issue did not substantially advance a legitimate state interest. The Tenth Circuit held that

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[7] Although Sinclair's facial challenge was ripe, the Ninth Circuit concluded that the district should apply *Pullman* abstention to defer adjudicating that claim. *Sinclair*, 96 F.3d at 409, *citing Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

"[d]espite the developers' insistence, the claim the developers bring here under the Takings Clause is not a facial claim challenging the validity of the regulation itself." Rather, their claims were that the ordinances "do not provide for any compensation for the burdens they place." *Id.* at 1175. In so holding, the Tenth Circuit emphasized that facial challenges, which do not depend on whether the property owner is compensated, "differ dramatically" from takings claims seeking compensation. *Id.* at 1175-76.

In sum, Petitioner's claim that there is widespread disagreement among the circuit courts, and/or that the First, Fourth, and Seventh circuits have held that "facial takings claims" are "exempt" from *Williamson County*, is error and mischaracterizes those decisions. The Circuit split alleged by Petitioner does not exist.

III. There is no Conflict Between the Third Circuit's Decision and this Court's Decision in *Williamson County*

Petitioner's last argument is that the Third Circuit's decision conflicts with this Court's takings precedents, because (according to Petitioner) her "facial takings claims" are exempt from *Williamson County*'s state court exhaustion requirement. Petitioner continues to make the same error the Third Circuit pointed out, and which was discussed above: she fails to distinguish between facial challenges and claims seeking just compensation for facial takings. *See* Petition at 29-31. Instead, Petitioner merely recites, almost verbatim, passages from the petitions this Court denied in *Wayside Church*, *Alto Eldorado*, and *Arrigoni*. *See* footnote 4, supra.

Petitioner also continues to rely upon the same cases she cited in the Third Circuit, which still do not support her attempt to avoid ***Williamson County***. For example, ***Keystone Bituminous Coal Ass'n v. DeBenedictis***, 480 U.S. 470 (1987) was not a "facial takings case" filed "without concern for state remedies" as Petitioner claims. Rather, ***Keystone*** resolved a facial challenge, not a takings claim for compensation, in which the parties stipulated to seek certification on the question of whether the regulations that restricted mining constituted any "taking." The case of ***Hodel v. Virginia Surface Mining & Reclamation Ass'n***, 452 U.S. 264 (1981) likewise did not involve any claim for compensation; it was a pre-enforcement challenge to a federal statute, and this Court's holding was contrary to Petitioner's current argument. This Court rejected the plaintiffs' facial challenge, and held that any taking claim under the Compensation clause was premature. Moreover, any compensation in ***Hodel*** would be owed by the federal government, not the state (***see*** 452 U.S. at 305-306), so ***Hodel*** is certainly not an example of a federal court affording merits review of a claim for compensation "without prior state court litigation," as Petitioner claims.

In ***Suitum v. Tahoe Reg'l Planning Agency***, 520 U.S. 725, 736 n.10 (1997), only the "final decision" requirement of ***Williamson County*** was at issue, not the exhaustion requirement. The cited footnote from ***Suitum*** (regarding "facial" challenges being ripe when the challenged regulation is passed), refers to exactly what the Third Circuit explained above. A facial challenge is ripe when a regulation is passed. However, while a regulation may constitute a facial taking when it is passed, that taking does not violate the Fifth Amendment (*i.e.*, it is not ripe) unless it is uncompensated.

Petitioner similarly cites *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 344-45 (2005) for the proposition that the plaintiffs there were never required to "ripen" their claims in state court, but rather, could have raised them in directly in federal court. *See* Petition at 30. However, those were facial challenges – that the statute did not "substantially advance" state interests – which the plaintiffs "gratuitously" presented to the state court. *San Remo*, 545 U.S. at 344. This Court emphasized that the facial challenges "by their nature requested relief distinct from the provision of 'just compensation.'" *Id.* at 345. Finally, Petitioner cites two circuit court decisions, *Peters, supra*, and *Opulent Life, supra*. The *Peters* case merely notes the general principle that facial challenges can be litigated immediately in federal court, and directly contradicts Petitioner's argument here: the court in *Peters* affirmed the dismissal of the plaintiff's takings claim (which was not a facial challenge) because the plaintiff did not pursue compensation in state court or demonstrate that those procedures were inadequate. In *Opulent Life*, the case was a facial challenge (unlike this case). The cases of *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987) and *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 244-45 (1986) (Petition at 32), likewise involved facial challenges, and neither involved any potential "state remedies." In both cases, this Court held that the respective federal statutes at issue did not effect Fifth Amendment "takings" requiring compensation. See *F.C.C.*, 480 U.S. at 250-254; *Connolly*, 475 U.S. at 221-228. In sum, not one of the cases cited by Petitioner represents a "merits review" of a "facial takings claim" for compensation without requiring, or appropriately excusing, the exhaustion requirement.

Finally, Petitioner erroneously argues that a statute may be "facially" challenged if it does not provide a "concurrent mechanism" for compensating property owners (*see* Petition at 30-31 and n. 3). That argument was explicitly rejected in ***Williamson County***: "[T]he Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." (A-28, quoting ***Williamson County***, 473 U.S. at 194).

In sum, as the Third Circuit correctly held, its decision in this case is "fully compatible" with this Court's jurisprudence.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari in this case should be denied.

Respectfully submitted,

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No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO,
Individually and in his Official Capacity as Scott
Township Code Enforcement Officer,
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit**

REPLY ON PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

It is well known in this Court,[1] amongst lower courts,[2] and the legal profession[3] that this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), is deeply flawed to the extent it requires property owners to exhaust state court remedies before asserting a violation of the Takings Clause of the Fifth Amendment. *Id.* at 194-96. It is also well known that *Williamson County* is the source of an ever-expanding class of jurisdictional "anomalies," inefficiencies, and injustices in property rights litigation. *San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J., joined by O'Connor, Kennedy, & Thomas, JJ., concurring in judgment). For these reasons, those with knowledge of *Williamson County*'s history and role in takings litigation agree with Justices of this Court that the precedent should be reconsidered.[4] *Id.* at 352 (Rehnquist, C.J., concurring).

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[1] *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, & Thomas, JJ., concurring in judgment).

[2] *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995) (*Williamson County* can be applied to create "draconian" results); *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283-84 (4th Cir. 1998) (*Williamson County* caused a takings plaintiff to pass "through procedural purgatory and wended its way to procedural hell"); *Wayside Church v. Van Buren County*, 847 F.3d 812, 825 (6th Cir. 2017) (Kethledge, J., dissenting) (*Williamson County* "has undermined the adjudication of federal takings claims against states and local governments."); *Del-Prairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1033 (E.D. Wis. 2008) (*Williamson County* creates a "catch-22" and functions to "strip[] federal courts of jurisdiction over federal takings claims" contrary to its "ripeness" purposes.).

[3] *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671, 702-03 (2004) (collecting critical commentary on *Williamson County*).

Respondent Township of Scott (Township) disagrees, however. In so doing, it gives great weight to the fact that *Williamson County* continues to exist, despite its near universal condemnation. *See* Brief in Opposition (Opp.) at 6-7, 16-17. But the mere fact that a mistaken and unworkable decision has managed to survive thus far does not make it correct or immunize it from reconsideration, particularly in an area as fluctuating as federal takings law. In *Lingle v.*

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[4] *See, e.g.*, R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under* Williamson County *Has Yet To Be Made*, 67 Baylor L. Rev. 567, 620 (2015) ("*Williamson County*'s hastily crafted, poorly-thought-out state procedures requirement has imposed incalculable losses on landowners and deprived them of rights supposedly guaranteed by both the Constitution and Congress. It is time to eat more crow" and overturn the precedent.); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199, 201 (2006) ("[T]he *Williamson County* State Litigation prong should be reexamined and eliminated."); Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2013 Cato Sup. Ct. Rev. 245, 263 (*Williamson County* "was also wrong. . . . The Court's confusion about these points in *Williamson County* led it, and eventually all of takings law, down a doctrinal cul-de-sac. It is time for a new turn.").

Chevron U.S.A. Inc., 544 U.S. 528 (2005), this Court reconsidered and abrogated a federal takings test that had been in place for the previous quarter-century because it was "doctrinally untenable as a takings test [and] its application as such would also present serious practical difficulties." *Id.* at 544. The same principles apply, to an even greater degree, to *Williamson County*. The Court should follow the same course it did in *Lingle* and overrule *Williamson County's* state litigation ripeness rule to bring doctrinal clarity, fairness, and predictability to federal takings litigation.

This is an appropriate case for taking such a step for several reasons. The decision below takes the wrong side in an important, direct conflict among the lower courts on the applicability of *Williamson County's* state litigation doctrine to facial takings claims; a conflict the Township fails to refute. Moreover, the case is squarely postured for resolution of the questions presented. The Township does not identify any procedural or jurisdictional defect in this case that would preclude the Court from using it as a vehicle to reconsider *Williamson County*. The Township is content to defend that decision on its merits. Opp. at 14-15. While Justices Kennedy and Thomas and former Justices Rehnquist and O'Connor believe that *Williamson County* is mistaken, *Arrigoni*, 136 S. Ct. 1409 (Thomas, J., dissenting from denial of certiorari); *San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J., concurring), the Township believes it is correct. The Court should grant the Petition to resolve the issue.

ARGUMENT

I.

THE TOWNSHIP FAILS TO REFUTE THE SUBSTANTIAL REASONS FOR RECONSIDERING *WILLIAMSON COUNTY*

The Township does not deny that *Williamson County*'s state litigation doctrine causes tremendous confusion and injustice in federal takings litigation, or that Justices of this Court have urged the Court to reconsider the doctrine. Instead, it argues that the Court should not use this case to reassess *Williamson County* because (1) it does not directly involve all the jurisdictional problems flowing from *Williamson County*, and (2) the Court has denied certiorari in other cases, allowing *Williamson County* to survive. Neither has merit.

Initially, the Township fails to understand the scope of the Court's review of a petition for certiorari. As the Court's rules make clear, the Court is concerned with far more than the specific facts and outcome in a particular case on which certiorari is sought. Sup. Ct. R. 10. It is concerned with the broader implications of the case and, particularly, whether the decision below raises federal issues of national importance. *Id.* In weighing these concerns, the Court naturally considers the broader effect of the precedent, law, or reasoning challenged in a petition for certiorari. This is especially true when the Court is asked to reconsider one of its precedents. The Court must consider whether the subject precedent is "unworkable in practice." *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965). This obviously allows and, indeed, requires consideration of the overall impact of the precedent on the area of law and human activity on which it operates. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 816-26 (1991) (considering overall effect of the evidentiary rules adopted in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), in overruling those decisions).

The fact that this case does not directly involve the removal-ripeness or res judicata problems arising from *Williamson County* and decried by Justices of this Court, *Arrigoni*, 136 S. Ct. at 1410-11 (Thomas, J., dissenting from denial of certiorari), has no bearing on its suitability for review. This case directly challenges the state litigation ripeness principle creating those problems. Their existence shows that *Williamson County*'s state litigation doctrine is unworkable in a variety of contexts and, thus, that the Court can and should reconsider it. The Township does not deny that this Petition asks the Court to do so, or that taking the case to overrule *Williamson County* would solve the many problems it has engendered.

The Township's second argument—that review of *Williamson County* is unwarranted because the Court has denied certiorari in other cases—is equally inapt. The denial of certiorari in a particular case does not imply anything about the merits of the case. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari) (denial "carries with it no implication whatever regarding the Court's views on the merits of a case"). Certainly, it does not suggest that the issues in the denied petition are unworthy of review. After all, the Justices of this Court may decline review for numerous, often differing, procedural and resource-based reasons. *Id.* at 917-18 (Frankfurter, J., respecting denial of certiorari). Given this reality, "[a]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted." *Id.* at 919 (Frankfurter, J., respecting denial of certiorari); *see also Darr v. Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) ("[D]enial means that this Court has refused to take the case. It means nothing else."). Consequently, the fact that this Court previously denied certiorari in a few other *Williamson County* cases arising from different courts, under different facts, and at different times than that here, is irrelevant to the important issues in the instant Petition.

It is far more common for this Court to grant petitions to overrule mistaken and unworkable precedent than one might suspect. *Payne*, 501 U.S. at 828 ("[T]he Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions."). This is especially true when it involves a constitutional doctrine that only this Court can rectify. *Id.*; *Lingle*, 544 U.S. at 544. *Williamson County's* state litigation doctrine is a constitutionally imbued ripeness concept, "whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 2164-65 (2013) (Sotomayor, J., concurring) (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)). It cries out for a corrective reassessment, and there is only one entity that can solve the problem: this Court. *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (per curiam). It is time for the Court to engage in the needed and inevitable reassessment of *Williamson County*, and the Township has provided no good reason for avoiding that step.

II.

THE TOWNSHIP FAILS TO NEGATE THE CONFLICT AMONG THE COURTS ON *WILLIAMSON COUNTY'S* APPLICATION TO FACIAL TAKINGS CLAIMS

As the Petition demonstrates, this case not only presents an important issue as to the correctness of *Williamson County*, it presents a conflict among the circuit courts as to whether facial takings claims are subject to *Williamson County* and unripe without exhaustion of state court litigation. Pet. at 24-29. The Township asserts that the "[c]ircuit split alleged by Petitioner does not exist," Opp. at 23, but it is almost impossible to understand how or why it makes this assertion. If the Township has a coherent basis for disputing the conflict, it is lost in a sea of semantic quibbling over purported distinctions between facial takings "claims" and "challenges."

The issue is simply this: is there a conflict among the circuit courts on whether property owners must use state procedures to ripen a claim that a law causes a taking of private property without just compensation on its face? Sometimes these facial takings allegations are called "claims" and sometimes "challenges." *Kamaole Pointe Development L.P. v. County of Maui*, 573 F. Supp. 2d 1354, 1373 (D. Haw. 2008) (using both terms interchangeably); *Goodwin v. Walton County*, 248 F. Supp. 3d 1257, 1265 (N.D. Fla. 2017) (same). The term does not matter. On the core question, circuit court precedent is loud and clear. It plainly shows that some circuits, such as the First, Fourth, Seventh, and Eleventh, consider a claim that a law causes a regulatory or physical taking without just compensation[5] on its face to be exempt from *Williamson County*. These circuits immediately allow facial takings claims in federal court upon enactment of the challenged law. Other circuits, such as the Sixth, Ninth, Tenth, and now the Third, require federal takings claimants to sue in state court under *Williamson County* to ripen their facial claims. *See* Pet. at 24-29.

A sample of district court decisions within the relevant jurisdictions confirms the conflict:

District court decisions from the First, Fourth, Seventh, and Eleventh Circuits:

- *Pharmaceutical Care Management Ass'n v. Rowe*, 307 F. Supp. 2d 164, 180 n.17 (D. Me. 2004) (Plaintiff raised "a facial challenge to the [Unfair Prescriptive Drug Practices Act], arguing by its terms, the law effects a [physical] taking of the Plaintiff's members' trade secrets. The offense is not the State's lack of adequate compensation for the taking, but rather the taking itself. As a facial challenge, the argument ripened when the State enacted the UPDPA." (citing *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992))).

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[5] As noted in the Petition, a regulatory takings claim alleges an unconstitutional taking arising from restrictions on the use of private property without just compensation. A physical taking involves an uncompensated occupation of property. Pet. at 13-14. In a different class of disputes, one may allege the government has violated the Fifth Amendment by taking property for a *non-public* use. *See Kelo v. City of New London*, 545 U.S. 469, 476 (2005). These "public use" cases are typically not called "takings" claims, *id.*, are not at issue here, and are not included within Knick's discussion of circuit court conflict on facial takings claims.

- *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 684 (W.D. Va. 2015) ("Plaintiffs' facial [physical takings] challenges are fit for judicial review at this time.").
- *International Union of Operating Engineers Local 139 v. Schimel*, 210 F. Supp. 3d 1088, 1100 (E.D. Wis. 2016) ("[P]roperly read as a facial challenge to Act 1, the Court concludes that the plaintiffs' takings claim is ripe for adjudication by this Court." (footnote omitted)).
- *Goodwin*, 248 F. Supp. 3d at 1265 ("The [*Williamson County*] doctrine does not apply to a *facial* takings claim because a facial challenge is 'generally ripe the moment the challenged regulation or ordinance is passed.'" (quoting *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997))).
- *Hillcrest Property, LLP v. Pasco County*, 731 F. Supp. 2d 1288, 1294 (M.D. Fla. 2010) ("In the case of a regulatory taking, if the 'claim arises in . . . a facial challenge rather than in . . . a concrete controversy concerning the effect of a regulation on a specific parcel of land, the only issue is whether the mere enactment of the regulation constitutes a taking.'" (citation omitted)).

District court decisions from the Sixth, Ninth, and Tenth Circuits:

- *Cornerstone Developers, Ltd. v. Sugarcreek Township*, No. 3:15-cv-93, 2015 WL 6472260, at *4 (S.D. Ohio Oct. 27, 2015) ("[R]egardless of whether a plaintiff is asserting a facial challenge or an as-applied challenge, a plaintiff seeking 'just compensation' under the Takings Clause is still required to satisfy the second requirement of *Williamson County*.").
- *Kamaole Pointe Development*, 573 F. Supp. 2d at 1373 ("[A] facial takings claim . . . may only be brought after *Williamson County*'s state compensation requirement is fulfilled.").
- *Swepi, L.P. v. Mora County*, 81 F. Supp. 3d 1075, 1158-59 (D.N.M. 2015) (holding that a facial regulatory takings claim was unripe under *Williamson County* until the plaintiff filed an action in state court).

In this case, the Third Circuit sided with courts that apply *Williamson County* to facial takings claims, in conflict with circuits that do not. The split is highly consequential. In circuits that do not apply *Williamson County*, facial takings claimants receive a hearing on the merits of their constitutional claim, just like most other classes of federal constitutional plaintiffs. *See, e.g.*, *International Union of Operating Engineers Local 139 v. Schimel*, 210 F. Supp. 3d at 1097-1101. But in circuits that apply *Williamson County*, the claimants have no right to review until they finish state court litigation, a requirement that creates jurisdictional traps that few takings plaintiffs can survive. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari); *Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 701 (6th Cir. 1996) (Under the government's *Williamson County* arguments, "this case will become another *Jarndyce v. Jarndyce*, with the participants 'mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their . . . heads against walls of words, and making a pretence of equity . . . .'" (quoting Charles Dickens, *Bleak House* 2 (Oxford University Press ed. 1989) (London 1853))).

To be precise, when courts require state litigation, the dutiful filing of a facial claim in state court often leads to its subsequent removal to federal court, where it may then be dismissed under *Williamson County* for lack of finished state litigation. *See, e.g., Ohad Associates, LLC v. Township of Marlboro*, No. 10-2183, 2011 WL 310708, at *1-2 (D.N.J. Jan. 28, 2011). If the facial claimant is lucky enough to finish state court proceedings, it will find that its now ripe claim is actually barred in federal court under res judicata and issue preclusion rules. *See, e.g., B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1099-1103 (10th Cir. 2008). Meanwhile, in *Williamson County*-free jurisdictions, facial takings claims are resolved or well on their way to resolution relatively soon after filing in federal court. *Rowe*, 307 F. Supp. 2d at 177-80 (granting a preliminary injunction based in part on a valid—and ripe—facial takings claim). Litigation of a right as important as the constitutional right to be free from laws that take private property without just compensation should not depend on the jurisdiction in which the complaint arises, and yet this is how the law now stands.

If the Court does not take the case to reconsider *Williamson County's* state litigation doctrine in its entirety, it should take it to resolve the conflict among the courts on whether the doctrine applies to facial takings claims.

CONCLUSION

The petition should be granted.

DATED: January, 2018.

Respectfully submitted,

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No. 17-647

IN THE

Supreme Court of the United States

ROSE MARIE KNICK, *Petitioner*,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CATO INSTITUTE, NFIB SMALL BUSINESS LEGAL CENTER, SOUTHEASTERN LEGAL FOUNDATION, AND BEACON CENTER AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

This brief addresses the first question raised by the Petition:

Whether the Takings Clause state-litigation requirement—barring property owners from filing federal takings claims in federal court until they exhaust state court remedies, which comes from *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)—should be reconsidered and ultimately abandoned as not only unworkable but an anomaly in fundamental-rights jurisprudence.

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that affect small businesses.

Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated for the protection of private property interests from unconstitutional takings.

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[1] Rule 37 statement: All parties received timely notice of *amici's* intent to file this brief. All parties lodged blanket consents with the Clerk. No counsel for any party authored any part of this brief; no person or entity other than *amici* made a monetary contribution intended to fund its preparation or submission.

The Beacon Center of Tennessee is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals.

This case is of significant concern to *amici* because it implicates the Fifth Amendment's protection of property rights against uncompensated takings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Thirty years ago, in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172 (1985), this Court pronounced a new and unfounded rule that a property owner must sue in state court to ripen a federal takings claim. This radical departure from historical practice has effectively shut property owners out of federal courts without any firm doctrinal justification. Worse—in a total miscarriage of justice—some courts apply ***Williamson County*** to deny access to *both* federal and state courts.

Property owners' lack of access to federal courts emboldens local governments to take aggressive, often unconstitutional regulatory action, knowing that a "final decision" can be delayed and that any practical challenge to state agency decisions must be brought in state courts, which will likely prove sympathetic to their fellow state officials. Before ***Williamson County***, there was no requirement that property owners first resort to litigation to ripen their takings claims. Before the ratification of the Fourteenth Amendment, courts played no role in the ripening of takings claims, and there is no basis for assuming that, through ratification, the Reconstruction Congress imposed any sort of litigation requirement on property owners seeking to ripen claims against state actors.

Williamson County's requirement is anathematic to the reforms that Congress sought to effect with the Reconstruction Amendments and enactment of U.S.C. § 1983. To curb pervasive abuse by state governments, the Fourteenth Amendment secured federal rights for all U.S. citizens. Congress enacted § 1983 to ensure that citizens would have a federal forum to vindicate their federal rights—precisely because there was concern that state courts could not be trusted to adequately enforce the federal Constitution against the coordinate branches of state government.

Williamson County's requirement to litigate in state court defeats the Reconstruction Congress's goal of opening the federal courthouse doors to citizens alleging violation of federal rights. This double standard cannot be justified on the ground that takings claims are "premature" before state court proceedings have run their extensive course, as claimed in *Williamson County*, 473 U.S. at 195–97. Any other constitutional rights case initiated in federal court is "premature" in exactly the same way—because there is always the chance that the plaintiff could have obtained redress in state court instead.

Similarly, it is dangerously misguided to justify this systematic exclusion from federal court by looking to the supposedly superior expertise of state judges on land-use issues. *See San Remo Hotel v. San Francisco*, 545 U.S. 323, 347 (2005). State judges could be said to have similar superior expertise on a variety of other issues that arise in constitutional litigation, including ones relevant to other rights protected by the Bill of Rights. After all, they understand local sensibilities, histories, and other particularities that might be just as relevant in an obscenity, reasonable-expectations, or unusual-punishment context.

But the regime created by *Williamson County* effectively consigns Takings Clause claims to second-class status. No other individual constitutional rights claim is systematically excluded from federal court in the same way. Recognizing the indefensible nature of these anomalies, four justices have already called for the overruling of *Williamson County* "in an appropriate case." *San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J., concurring).

That appropriate case has now arrived.

ARGUMENT

I. *WILLIAMSON COUNTY'S* STATE-LITIGATION REQUIREMENT MUST BE ABANDONED

In *Williamson County*, the Court, reasoning that a Takings Clause claim could not proceed in federal court until it was "ripe," establishing two conditions that had to be met before a federal court could hear the case. "The government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulation to the property at issue," 473 U.S. at 186, and the claimant must have sought "compensation through the procedures the State has provided for doing so." *Id.* at 194. Thus, "if a State provides an adequate procedure for seeking just compensation the property owner cannot claim a violation of the Just

Compensation Clause until it has used that procedure and been denied just compensation." *Id.* at 195. However reasonable this requirement seemed at its adoption, it has proven to do more harm than good.

This Court has said that "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). Therefore, "the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case." *Id.* One reason for overruling precedent is when the rule has proven unworkable in practice. *Id.* Another is when changed circumstances—or the same circumstances differently viewed—establish that the old rule cannot be justified. *Id.* at 855. This Court, and the courts below it, need not continue to apply a rule that promotes injustice in the name of *stare decisis*. *See Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003). The state-litigation requirement only prevents people whose property has been taken from receiving the just compensation they are due under the Fifth Amendment. The rule should be abandoned "as unsound in principle and unworkable in practice." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

A. The State-Litigation Requirement Often Prevents Judicial Review of State- and Local-Government Takings

The obstacles *Williamson County* imposes on property owners wishing to assert a federal takings claim are well-known. The requirement that property owners first get a "final decision" from the relevant state agency, *Williamson County*, 473 U.S. at 186, can lead to protracted delay. *See Res. Invs., Inc. v. United*

States, 85 Fed. Cl. 447, 498 (2009) ("complicated permitting processes are rife with delays," citing cases, including *Williamson County*, showing that delays frequently range from sixteen months to eight years). But the worst irony of *Williamson County*'s state-litigation requirement is that the plaintiff who satisfies it has, in effect, lost the right to proceed in federal court, because takings claims—once litigated to completion in state court—cannot be re-litigated. Some combination of general principles of res judicata, issue preclusion, the federal full-faith-and-credit statute, 28 U.S.C. § 1738, and possibly the *Rooker-Feldman* doctrine, doom any effort to obtain federal judicial review of a federal constitutional claim once it has been litigated in state court. *See San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring).[2] This anomalous state of affairs led Chief Justice Rehnquist to urge the Court to re-examine *Williamson County*. Joined by Justices O'Connor, Kennedy, and Thomas, the chief justice wrote:

> I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . . I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or

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[2] Chief Justice Rehnquist also observed that this effect of *Williamson County* was not limited to making the federal court unavailable for takings claims. He noted that some state courts have applied the state-litigation requirement to refuse to allow plaintiffs to litigate federal claims even in state court. *See San Remo Hotel*, 545 U.S. at 351 n.2 (Rehnquist, C.J., concurring).

> local government entity must first seek compensation in state courts.

Id. at 352. *See also Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003) (recognizing that the "requirement that all state remedies be exhausted, and the barriers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous," but that it "is for the Supreme Court to [resolve], not us"). This is the appropriate case for that resolution.

B. Defendants Can Exploit the State-Remedies Rule to Deny Property Owners Both State and Federal Judicial Forums

Since *Williamson County* was decided, the state-litigation requirement has generated massive and recurrent legal confusion in the lower courts. Courts and commentators alike have virtually exhausted the resources of the English language in describing the difficulties *Williamson County* imposes on lower courts and its manifest unfairness to takings plaintiffs.[3] The exhaustion requirement provides recalcitrant state and local officials with a pre-approved roadmap to insulate their decisions from independent review. *Williamson County*, 473 U.S. at 196.

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[3] *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 702–03 (2004) (collecting descriptions such as "unfortunate," "ill-considered," "unclear and inexact," "bewildering," "worse than mere chaos," "misleading," "deceptive," "source of intense confusion," "inherently nonsensical," "shocking," "absurd," "unjust," "self-stultifying," "pernicious," "revolutionary," "draconian," "riddled with obfuscation and inconsistency," containing an "Alice in Wonderland quality" and creating "a procedural morass," "labyrinth," "havoc," "mess," "trap," "quagmire," "Kafkaesque maze," "a fraud or hoax on landowners," "a weapon of mass obstruction," "a Catch-22 for takings plaintiffs").

For example, the property owner in *Williamson County* was instructed that it should have utilized the inverse-condemnation procedure available under state law to ripen the takings claim. *Id.* This advice ignored the fact that inverse-condemnation claims never succeed where direct challenges to regulations have failed. Similarly, the *Williamson County* rule requires individual applicants to seek variances right after their zoning applications are denied, *see id.* at 191, even though the standards for obtaining variances are higher than those for the original zoning applications and are never granted in the absence of changed circumstances. *See, e.g.*, William Maker, Jr., *What Do Grapes and Federal Lawsuits Have in Common? Both Must Be Ripe*, 74 Alb. L. Rev. 819, 834 (2010–2011) ("Not only are the standards for a use variance different from the standards for site plan approval, they are much more stringent.").

At the very least *Williamson County* assumed that a property owner would have the opportunity to attain a decision in state court; an assumption that has proven wrong. The Court did not anticipate that *Williamson County* would be weaponized by government defendants looking to short-circuit takings claims brought in state court.

In *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), this Court held that a takings claim, filed in state court, could be removed to federal court. *Id.* at 161. Governmental defendants have since removed takings cases to federal court based on federal-question jurisdiction. Then—with all the *chutzpah* that can be mustered—they have sought dismissal asserting that the federal takings claim is unripe because there has been no state court decision, as required by *Williamson County*. *See* J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County's *Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 334 n.78 (2014).

Some courts don't buy this tactic.[4] But many do.[5] Consequently, many takings plaintiffs are unable to complete the *Williamson County* state remedies requirement and may be barred from filing a second suit by the statute of limitations—or otherwise forced to exhaust their legal budget on these procedural games. *Cf. Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.").

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[4] *See*, e.g., *Yamagowa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (city removed case to federal court, and on the eve of trial sought remand under *Williamson County*; court rejected the argument, concluding "the City having invoked federal jurisdiction, its effort to multiply these proceedings by a remand to state court smacks of bad faith.").

[5] *See Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 625 (5th Cir. 2003); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903–04 (8th Cir. 2006); *Ohad Assocs., LLC v. Twp. Of Marlboro*, Civil No. 10-2183 (AET), 2011 U.S. Dist. LEXIS 8414, at *3, 6-8 (D.N.J. Jan. 28, 2011); 8679 *Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569-MCE-EFB, 2010 U.S. Dist. LEXIS 93303, at *4, 13–14 (E.D. Cal., Sept. 8, 2010); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174–75 (D. Kan. 1999); *see also Del-Prarier Stock Farm, Inc. v. Cnty. of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis. 2008).

II. THERE IS NO DOCTRINAL BASIS FOR THE STATE-REMEDIES RULE

Ironically, "the very procedure that [*Williamson County*] require[s] [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also preclude[s] [them] from ever bringing a Fifth Amendment takings claim." *Santini v. Conn. Hazardous Waste Mgmt. Service*, 342 F.3d 118, 130 (2003). This is absurd. If a takings claim only ripens with a state court decision denying just compensation, then the protections of the Fourteenth Amendment are rendered illusionary and unenforceable as there is no available remedy. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 330–31, 347–48 (1816) (ruling lower federal courts must be authorized to hear cases concerning "all subjects within the purview of the constitution."). This rule contravenes the very purpose of the Fourteenth Amendment in affording protections for federal rights against the states, and the fundamental premise of our constitutional system—entailed in the maxim that "For every right, there must be a remedy." Sir William Blackstone, 1 William Blackstone, Commentaries On The Laws of England, 137 (Oxford, Clarendon Press 1765-1769) (commenting on Chapter 29 of Magna Carta: "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries.") (alteration of original).

A. *Williamson County* Pronounced a New and Unfounded Ripeness Rule for Takings Claims

This Court holds that the requirements for Article III standing are satisfied once a litigant shows that there is a live case or controversy concerning a question of federal law. *See Warth v. Seldin*, 422 U.S.

490, 500 (1975) (emphasizing standing "in no way depends on the merits."). ***Williamson County*** assumes that special ripeness rules apply in the context of a takings claim.[6] Specifically, the opinion construed the words of the Takings Clause as imposing a requirement to pursue "just compensation" in state court to ripen a takings claim against a state actor.

If the Fifth Amendment required individuals to seek compensation in court, that requirement would seemingly apply equally to claims against state and federal actors. Indeed, there is no basis for assuming a different standard for ripening takings claims against state and local entities than against the United States. The text of the Fifth Amendment certainly imposes no such requirement. For that matter, its prohibition was originally directed only *against the federal government*. *See Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833).

The Fourteenth Amendment imposed no special ripening requirement. Incorporation doctrine does not alter the nature of the constitutional protections secured in the Bill of Rights; it simply makes constitutional guarantees applicable against the states as against the federal government. ***McDonald v. City of Chicago***, 561 U.S. 742, 765 (2010). Any special ripening requirement would have to be derived from the text of the Fifth Amendment, which would necessarily make that requirement equally applicable to claims against the United States. *Cf.*, John D. Echeverria, Stop the Beach Renourishment: *Why the Judiciary is Different*, 35 Vt. L. Rev. 475, 489 (2010) ("If the judicial branch of state government is subject to the Takings Clause, which applies to the states via incorporation through the Fourteenth Amendment, then the judicial branch of the federal government must also be subject to the Takings Clause.").

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[6] And worse, some courts extend *Williamson County's* state litigation requirement to due process claims. *See, e.g., Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 515 (2d Cir. 2014) *cert. denied* (2015); *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1299 n. 19 (10th Cir. 2008); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961 (7th Cir. 2004).

It would be nonsensical to say that a property owner must litigate a claim for just compensation in order to ripen a takings claim against the federal government. The rule is circular. The Takings Clause does not entail any requirement to ripen a takings claim in court. *See Monongahela Navigation Co. v. United States*, 13 S. Ct. 37 (1893) (emphasizing that the question of whether just compensation has been denied by an Act of Congress is a "judicial . . . question."); *see also Hunter's Lessee*, 14 U.S. at 330–31.

Moreover, the courts played no role in the ripening of takings claims in the 19th century. *See e.g., Kennedy v. Indianapolis*, 103 U.S. 599, 601 (1880) (recognizing a "controversy" as to whether just compensation had been paid under Indiana's Takings Clause, which was essentially identical to the Fifth Amendment); *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 176-77 (1871) (assuming a ripened controversy when interpreting Wisconsin's Takings Clause, which was nearly identical to the Fifth Amendment). Prior to *Williamson County*, the courts understood takings claims to be properly raised if (a) the owner's property had been taken by legislative or executive action, (b) without affording a contemporaneous administrative avenue for obtaining the compensation guaranteed by the Constitution. *See e.g., Cherokee Nation v. S. Kan.*

Ry. Co., 135 U.S. 641, 667–68 (1890) (case proceeded to federal court after the Cherokee Nation refused to accept an offer of compensation deemed adequate by the Executive Branch). This was true for both claims asserting a violation of the Fifth Amendment and equivalent claims raised under state takings clauses. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60–61 (1999) (explaining that, prior to the Civil War, courts recognized actionable claims in challenge to legislative enactments purportedly authorizing takings in the absence of any statutorily defined administrative procedure for obtaining compensation).

B. The Fourteenth Amendment and § 1983 Conferred Federal Protections for Property Rights—Including the Right to a Federal Judicial Forum—on the Same Terms as Other Fundamental Rights

The Fourteenth Amendment prohibits state actions that deprive individuals of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. It would be truly strange if one of the three rights explicitly listed in the text was not ensured any means of protection in federal court. It would be inconceivable that either life or liberty would be left unprotected, without opportunity for aggrieved individuals to vindicate their rights in federal court. The same must be true for property—which the Fourteenth Amendment protects on equal terms.

The need to protect property rights against abusive state and local governments was one of the main purposes behind the enactment of the Fourteenth Amendment. Advocates feared that southern state governments threatened the property rights of African-Americans and other political minorities, including whites who had supported the Union against the Confederacy during the Civil War. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 268–69 (1998); *see also* Ilya Somin, The Civil Rights Implications of Eminent Domain Abuse, Testimony before the U.S. Comm'n on Civil Rights, 5-11 (Aug. 12, 2011) (explaining that minorities suffer disproportionately in the absence of strong property right protections).[7] The right to private property was a central component of the "civil rights" that the framers of the Fourteenth Amendment sought to protect.[8] "Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil liberties which the Amendment was intended to guarantee." *Shelly v. Kraemer*, 334 U.S. 1, 10 (1948).

The need to seek redress in a federal judicial forum was viewed as especially important for vindication of these rights. The Reconstruction Congress was not concerned only with the possibility of abuse at the hands of the legislature and executive branches of state government, *See Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982), but with abuses that may be pervasive and systemic—throughout all coordinate branches of state government. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713–14 (2010) (affirming that the Takings Clause applies on equal terms to all branches of state government). There was special skepticism as to whether state courts could be trusted to vindicate federal rights against abuse—especially for African Americans recently freed from slavery. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972); Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol'y 92, 101–03 (2011) (observing that state court judges are sometimes influenced by political pressure—especially those who are elected, or appointed by a politically motivated coalition). Responding to continued abuses, in which state courts were complicit, the Reconstruction Congress enacted U.S.C. § 1983 to ensure that the federal court house doors would be open for any individual seeking vindication of federal rights. *See Briscoe v. Lahue*, 460 U.S. 325, 363–64 (1983) (noting that "[t]he debates over the 1871 Act are replete with hostile comments directed as state judicial systems."). Against this historical backdrop, there is no reason to assume that Congress intended to exclude takings claimants from vindicating their federal rights in federal courts. *Cf. San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (suggesting that owners should be allowed to initiate takings suits in federal court against state actors under Section 1983).

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[7] Available at http://bit.ly/2jBpR10 (last visited Nov. 28, 2017).

[8] On the centrality of property rights in 19th-century conceptions of civil rights, *see, e.g.*, Harold Hyman & William Wiecek, *Equal Justice Under Law: Constitutional Development*, 1835-75, 395–97 (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991) (describing how most 19th-century jurists viewed property as a fundamental right).

C. Federal Judicial Review of Federal Constitutional Claims Is Vital to the Uniform Protection of Fundamental Rights

In its landmark 1816 decision, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), this Court outlined two crucial reasons why it is imperative that federal judicial review be available for all constitutional claims: (1) the need for uniformity, and (2) the danger that state courts will fail to vindicate federal rights against their own state. Justice Joseph Story stressed "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Id.* at 347–48 (Story, J.) (emphasis in original). If 50 different state judiciaries address takings claims with only the remote possibility of federal review, that uniformity is unlikely to arise:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.

Id. at 348.[9]

Justice Story's concern has proven prescient; states differ greatly in the extent of protection they provide for takings claims. *See* Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 Pub. Admin. Rev. 411 (1997) (describing state standards).

In *Martin*, Justice Story also emphasized that federal review is essential because state courts might be unduly partial to the interests of their own states:

> The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.

Martin, 14 U.S. at 346–47.

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[9] Although *Martin* addressed the need for federal appellate review of state decisions on federal issues, the same concern also necessitates an avenue for aggrieved parties to file federal constitutional claims in federal district courts. When Takings Clause claimants must file in state court and appeal unfavorable decisions up through the state-court system, there cannot be any federal review at all, except in the rare Supreme Court case.

Such "state prejudices" and "state interests" are particularly likely to exert a pernicious effect when state courts are asked to require state and local governments to pay compensation for violations of the Takings Clause. State judges, many of whom are elected, often have close connections to the political leaders who control state policy. *See* Ilya Somin, Stop the Beach Renourishment, *supra*, at 99–100. While conscientious judges will surely try to rule impartially, their political and institutional loyalties could easily influence their decisions, consciously or not. Moreover, state officials might deliberately seek judges more inclined to rebuff federal claims that threaten state government interests. *Id.* at 99. Such dangers make a federal forum for ensuring the protection of constitutional rights essential.

D. The State-Litigation Rule Unjustifiably Consigns Takings Clause Claims to Second-Class Status when Compared with Other Fundamental Rights

No other constitutional right receives the same belittling treatment the Takings Clause received in *Williamson County*. Plaintiffs alleging state violations of virtually any other constitutional right can take their claims straight to federal court. This is true of rights guaranteed in the First Amendment, Second Amendment, and throughout the Bill of Rights. *See, e.g., McDonald v. City of Chi.*, 561 U.S. 742 (2010) (Second Amendment); *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002) (First Amendment); *Hudson v. McMillian*, 503 U.S. 1 (1992) (Eighth Amendment). The same rationale famously applies to rights protected by the Fourteenth Amendment, including unenumerated rights. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Bd. of Educ.*, 347 U.S. 54 (1954).[10]

No other type of federal right is systematically barred from federal court, forcing litigants to file claims in the courts of the very state government that committed the violation. The result is an indefensible double standard. As the Court has emphasized, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The Court has suggested two justifications for its anomalous treatment of Takings Clause claims. First, that a plaintiff's claim that his property has been taken is "premature" before he has exhausted state compensation "procedures." *Williamson County*, 473 U.S. at 195–97. Second, that state courts have greater familiarity with takings issues than federal courts do. *See San Remo Hotel*, 545 U.S. at 347 ("[S]tate courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."). These rationales cannot withstand scrutiny. If applied to suits asserting violations of other rights, they would lead to the exclusion of numerous cases that federal courts routinely hear.

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[10] It would be inconceivable to require people seeking vindication of Fourteenth Amendment rights to sue in state court if Texas decided to reinstitute a poll tax, or if Illinois decided to deny equal apportionment of legislative districts. Similarly, this Court would never tolerate a requirement to seek redress in state court for alleged violations of the Equal Protection Clause if, for example, Georgia enacts a law prohibiting Muslims from holding public office, or if Mississippi should enact a law imposing heightened sentencing requirements on African Americans, or if officials in Iowa should refuse to issue marriage licenses to same-sex couples.

1. Federal court consideration of Takings Clause claims is no more "premature" than their consideration of other constitutional claims.

Under *Williamson County*, a federal claim against a state government for an uncompensated taking is "premature" until the owner has tried to obtain compensation "through the procedures the state has provided for doing so," including litigation in state court. *Williamson County*, 473 U.S. at 194. This reasoning can be used to justify denial of a federal venue for any other constitutional rights claim.

Under *Williamson County*'s reasoning, a claim that a state statute that infringed on a plaintiff's First Amendment right to free speech could be "premature" until she has asked a state court to invalidate the statute that gave rise to the violation. Yet no one suggests that such claims must reach a "final decision" in state court before any federal court can step in. Even if a state court claim might potentially remedy the violation of federal rights, a violation giving rise to a federal cause of action has still occurred. Similarly, that a state court might remedy a Takings Clause violation by providing compensation does not negate the violation—which is complete when the government takes the property without just compensation.

2. State courts have no greater expertise with Takings Clause claims than with numerous other constitutional claims that federal courts routinely hear.

The "expertise" rationale for *Williamson County*'s rule fares no better. State judges *may* know more than federal judges about "complex factual, technical, and legal questions related to zoning and land-use regulations," but the same can be said of issues that arise in many cases involving other constitutional rights. *See* Ilya Somin, *Federalism and Property Rights*, 2011 U. Chi. Legal Forum 1, 28–31 (giving numerous examples). This possibility has never been sufficient to deny a plaintiff access to federal review.

For example, some Establishment Clause claims require a determination of whether a "reasonable observer . . . aware of the history and context of the community and forum in which [the conduct occurred]" would view the practice as communicating a message of government endorsement or disapproval of religion. *Capitol Square v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring). State judges may have more detailed knowledge of their community's perceptions than federal judges, but that does not stop aggrieved parties from bringing Establishment Clause cases to federal court.[11]

Similarly, this Court has ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Whether any given speech is likely to incite "imminent lawless action" may well depend on variations in local conditions. Although state judges may be best informed about such conditions, free-speech claims are not consigned to state courts.

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[11] Of course, federal district judges also live in the communities where they preside—they don't exist in some federal ether—and, as leading citizens, may be even better perceive local goings-on.

As Chief Justice Rehnquist noted in *San Remo Hotel*, "the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the Equal Protection Clause." 545 U.S. at 350–51 (Rehnquist, C.J., concurring).

Furthermore, there is no reason to assume that state judges necessarily have greater knowledge of Takings Clause and other property-rights issues than federal judges do. They may have greater knowledge of local conditions and regulations, but on the other hand federal judges may have greater knowledge of relevant federal jurisprudence. Somin, Stop the Beach Renourishment, *supra*, at 102–03. Ultimately, this rationale does not provide a principled reason to prevent federal courts from hearing this single type of constitutional claim.

The right to vindicate federally secured rights is held sacrosanct in all other contexts. Yet without any real explanation, *Williamson County* has relegated the right to receive "just compensation" for the taking of one's property to the status of an unprotected right—despite its explicit protection in constitutional text.

CONCLUSION

The petition should be granted.

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No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PA; CARL S. FERRARO,
Individually and in his Official Capacity as Scott
Township Code Enforcement Officer,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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INTEREST OF *AMICUS CURIAE*

The undersigned *amicus curiae* files this brief in support of the Petitioner.[1] The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

The Institute for Justice is also committed to the idea that the protection of individual rights requires an engaged federal judiciary that stands ready to defend those rights when they are infringed. For too long, however, the doors of federal courts have been all but closed to property owners seeking to vindicate their 5th Amendment rights. While, in every other area the Institute litigates, violation of a federal constitutional right entitles (and should entitle) a citizen to a federal constitutional remedy, property owners are routinely denied access to a federal forum.

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[1] Counsel for the *amicus curiae* authored this brief alone and no other person or entity other than the *amicus curiae*, its members or counsel have made a monetary contribution to the preparation or submission of this brief. Both the Petitioner and the Respondents consented to the filing of this brief by stipulations filed with the Court. The *amicus curiae* timely notified counsel for the parties that we intended to file this brief.

For more than three decades, the judiciary in this country has been hamstrung in its ability to properly adjudicate federal takings claims because of the decision in ***Williamson County Reg. Plan. Commn. v. Hamilton Bank***, 473 U.S. 172 (1985). Lower federal courts have expressed frustration at their inability to adjudicate federal takings claims after ***Williamson County***, with descriptions running the gamut from "odd" and "unfortunate" (***Fields v. Sarasota-Manatee Airport Auth.***, 953 F.2d 1299, 1306, 1307 [11th Cir. 1992]) to "draconian" (***Dodd v. Hood River County***, 59 F.3d 852, 861 [9th Cir. 1995]), with one concluding that the situation presents "a Catch-22 for takings plaintiffs" (***Santini v. Conn. Hazardous Waste Mgmt. Serv.***, 342 F.3d 118,130 [2d Cir. 2003]), and another describing the plaintiff as having "already passed through procedural purgatory and wended its way to procedural hell" (***Front Royal etc. Corp. v. Town of Front Royal***, 135 F.3d 275, 283-84 [4th Cir. 1998]).[2]

Enough cases have been decided to make it clear that the law is every bit as confused and unjust as the commentators cited in footnote 2 describe. It is also clear that lower courts feel unable to solve the problem because the problem stems from this Court's jurisprudence. How to bridge the "anomalous gap" in that jurisprudence as described by one Circuit Court "is for the Supreme Court to say, not us." (*Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 [8th Cir.], *cert. den.* [2002].)

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[2] A collection of the harshly critical analyses directed at ***Williamson County*** by commentators from all parts of the jurisprudential spectrum — even those who agree that this litigation belongs in state court — appears in Michael M. Berger & Gideon Kanner, ***Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage***, 36 Urb. Law. 671, 702-03 (2004).

The core issue in this case is one that has caused confusion and injustice since this Court's decision in *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985). The issue is whether property owners claiming that government action has taken their property without just compensation in violation of the 5th Amendment to the U.S. Constitution have the right — like other constitutional claimants — to have their cases decided on the merits in federal courts. (See, e.g., *Bell v. Hood*, 327 U.S. 678, 681 [1946] [complaint seeking compensation for violation of 4th and 5th Amendments belongs in federal court *if the plaintiff so chooses*].) The decisions by lower state and federal courts have been confused and unjust. The only consistency about them is that they have deprived property owners of access to the federal courts, while saying that they are applying a rule that will "ripen" the cases for federal court litigation. As those decisions have made clear, this Court is the only court that can clarify and make sense of this foundational question of federal court jurisdiction.

The Institute for Justice, sometimes on behalf of property owners and sometimes on behalf of itself as an organization, has regularly litigated about ripeness in property-rights cases and urges the Court to resolve the inequities in that doctrine.

SUMMARY OF ARGUMENT

1. It is time for the Court to reconsider *Williamson County's* state court litigation prong, which requires state court confirmation that there is no state remedy for a governmental taking of property. Only then will it be said that a 5th Amendment claim is "ripe" for federal court litigation. The premise of that rule goes beyond the plain language and meaning of the 5th Amendment. A municipality's taking of private property without just compensation is complete *when* property is taken and compensation is not paid *by the government*. It does not require a judicial determination to complete, or ripen, the taking. And, if it did, there is no reason why such a determination must take place in state court.

2. This Court's cases since *Williamson County* have shown the need to disapprove the state court litigation requirement. ***First***, in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) this Court authorized a municipal defendant sued for a taking in state court to remove the case to federal court, even though removal is proper *only* if the plaintiff could have brought suit in federal court in the first place (28 U.S.C. § 1441[a]) — something *Williamson County* forbids. ***Second***, in *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005), the Court held that, once a case is brought and tried in state court — as commanded by *Williamson County* — issue

preclusion would prevent prosecuting such a case in federal court. Four concurring Justices urged reconsideration of *Williamson County*. ***Third***, in *Horne v. United States Dept. of Agriculture*, 133 S. Ct. 2053, 2062, n. 6 (2013), the Court concluded that, once there has been a taking without payment, a proper constitutional claim has been presented, without the need for further "ripening."

3. No other constitutionally protected right is subjected to state court "ripening" as a condition precedent to suit in federal court. If the 5th Amendment's protection of property is truly no "poor relation" to the rest, as this Court proclaimed in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), then it is entitled to equal access to federal courts.

4. Both *Williamson County* and this case were brought under the Federal Civil Rights Act, 42 U.S.C. § 1983. Such cases are probably the worst cases in which to inject a state court litigation requirement. As this Court has held, the point of section 1983 was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." (*Mitchum v. Foster*, 407 U.S. 225, 243 [1972].) There is no room in that formulation for a rule that interposes the state courts as a bar to federal court access.

ARGUMENT

I.

WILLIAMSON COUNTY WAS WRONGLY DECIDED. LATER DECISIONS OF THIS COURT HAVE PLAINLY DEMONSTRATED THAT ERROR

The 5th Amendment's Just Compensation Clause prohibits government from taking private property for public use unless it pays just compensation. It has only two components: taking property and payment. A violation of that provision occurs as soon as government action takes private property and the municipality fails or refuses to pay. There is nothing in either logic or language to require a state court to certify that there will be no payment under state law before the taking is complete.

A.

Williamson County is Fatally Flawed

Here is the flaw at the heart of *Williamson County*: it held that the taking was not complete until compensation was denied not just by the taking entity, but also by the state courts.

Williamson County quite properly began its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at

194.) The problem arises because the Court then blurred the distinction between acts of the agency that actually committed the taking and the State that may or may not have provided compensation through its judiciary. (473 U.S. at 195-96.)

But the *state* is not involved in 42 U.S.C. § 1983 cases. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amend.; but see *First English*, 482 U.S. at 316, n. 9). The real issue in cases like this is whether the local entity — like the Township of Scott — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the town can be *compelled* to pay lies at the heart of litigation in either state or federal court.

The crux of the problem with *Williamson County* is that it *merged the state legal system with the local agency defendant* and disregarded the plain words of the Constitution. Nothing in the 5th Amendment requires multiple litigation or state court deference. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by unsuccessfully suing a municipality in state court.*"

The issue is not whether a state's judiciary has countenanced the constitutional violation, but whether the municipal defendant has committed it. 42 U.S.C. § 1983 forbids any person, including municipalities (*Monell v. Dept. of Social Services*, 436 U.S. 658, 690 [1978]), acting under color of state law from violating rights secured by federal law. The gravamen of a 5th Amendment claim is a taking of property[3] and nonpayment by the taker. When a municipality — like Scott — conscripts private property without any pretext of compensation, it violates the 5th Amendment. The presence or absence of a state remedy has no bearing on whether the malefactor did the deed.

Two years after *Williamson County*, the Court understood this, describing *Williamson County* as holding that "an illegitimate taking might not occur *until the government refuses to pay*" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 320, n. 10 [1987]; emphasis added), without any reference to whether a state court had refused to *order* payment. In any event, if a municipality refuses to provide compensation as required by the U.S. Constitution and recourse to the courts must be had, there is no reason why such recourse should — let alone must — be had only in *state* courts when the *federal* constitution is being violated.

Deferring to state courts is tantamount to granting states a veto over access to federal court, making them *de facto* federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

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[3] As explained in *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945), it is the deprivation of the owner that constitutes the compensable taking.

Mandating suit in state court adds to the 5th Amendment a remedial requirement. But the just compensation language has repeatedly been read by this Court as a limitation on government's power, not an invitation for an injured property owner to sue for payment. The Just Compensation Clause is self-executing. (*First English*, 482 U.S. at 315.)

If nothing else, any required suit for payment is contrary to Congressional policy established in 1970 in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that the old days of grabbing property first and then saying "sue me" to the aggrieved owner are over. (Compare *Stringer v. United States*, 471 F.2d 381, 384 [9th Cir. 1973]; *United States v. Herrero*, 416 F.2d 945, 947 [9th Cir. 1969].) That Act makes it illegal for government agencies to make it necessary for property owners to sue for their just compensation.[4] Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42 U.S.C. § 4651[1]) or, failing that, condemnation (42 U.S.C. § 4651[8]).

In any event, if suit is required to demonstrate the actuality of a 5th Amendment violation, there is nothing in the 5th Amendment directing that the *only* place to seek that determination is in *state* court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff. (*Bell*, 327 U.S. at 681.)

There is no need to sue in State court merely to confirm the non-payment of just compensation. The non-payment is obvious; it is the reason for the suit. Had there been payment, there would be no litigation. This can be seen in any regulatory taking case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That process consumed 13 years. At no time — even after a trial on the merits resulted in a compensatory judgment — did the city volunteer to pay anything. Suit was not necessary to determine the lack of compensation, or the city's lack of interest in paying.

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[4] The Act provides succinctly, "No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." (42 U.S.C. § 4651[8].) To make this a truly "uniform" law, as its title advertised, the policies in Section 4651 were made applicable to the states — by directing that federal funds could not be spent on state projects unless the state agreed to comply with these policies. (42 U.S.C. § 4655.)

Nor is a state suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless public hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. Scott was not in doubt about that claim. It simply chose not to honor it. Imposing on Ms Knick (not to mention the time of the state courts) merely to confirm that obvious fact serves no legitimate purpose.

With respect, *Williamson County* erroneously construed the 5th Amendment to require a wasteful detour through state courts as a precursor to federal court litigation of a core federal constitutional issue. As shown below, it is even worse. Lower court efforts to grapple with this rule, attempting to apply it while also giving deference to general rules of preclusion, have created only chaos. It is time for this Court to acknowledge the original error and overrule the state court ripening requirement.

B.

This Court's More Recent Cases Are Not Compatible with *Williamson County*

This Court's post-*Williamson County* cases cannot be reconciled with it. *Williamson County's* rule is that takings claims (whether directly under the Constitution or via 42 U.S.C. § 1983) must first be brought (and lost) in state court in order to render them ripe and viable in federal court.

But this Court has repeatedly held to the contrary, albeit without directly noting the conflict thus created with *Williamson County*.

First, in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) this Court authorized a municipal defendant sued for a taking in state court to remove the case to federal court. But removal is proper *only* if the *plaintiff* could have brought suit in federal court in the first place. (28 U.S.C. § 1441[a].) Under *Williamson County*, however, the plaintiff could not have filed suit initially in federal court. Such a suit would have been dismissed, with the lower courts relying on *Williamson County*. Acknowledging that the juxtaposition of *Williamson County* and *College of Surgeons* was "anomalous," the Eighth Circuit Court of Appeals concluded that how to resolve that conundrum "is for the Supreme Court to say, not us." (*Kottschade*, 319 F.3d at 1041.)

Second, in *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005), the Court held that, once a case is brought and tried in state court — as commanded by *Williamson County* — issue preclusion would *prevent* prosecuting such a case in federal court. Thus, state court litigation does not *ripen* a 5th Amendment claim, it *ends* it. The rationale for state court litigation has been undermined by *San Remo*.

Third, in *Horne v. United States Dept. of Agriculture*, 133 S. Ct. 2053, 2062, n. 6 (2013), the Court concluded that, once there has been a taking without payment, a proper constitutional claim has arisen. This undermines another key element of *Williamson County*, i.e., the idea that mere non-payment is not enough to ripen 5th Amendment litigation. In addition, there must be a holding by a state court that compensation is not required. *Horne* is contrary to this *Williamson County* holding.

In these three post-*Williamson County* opinions, the Court has eliminated any jurisprudential basis for continuing to hew to that plainly outmoded precedent.

It is time, as the late Chief Justice and three others proclaimed in *San Remo*, for the Court to reconsider *Williamson County* and remove it from the precedential rolls. (545 U.S. at 348-52 [Rhenquist, C.J., concurring, joined by O'Connor, Kennedy, and Thomas, JJ.].)

II.

NO OTHER CONSTITUTIONALLY PROTECTED RIGHTS ARE SHUNTED TO STATE COURTS FOR "RIPENING"

Property rights are the only constitutional rights subjected to a *Williamson County*-like ripening. This Court's cases dealing with other rights make this plain.

Just as the Constitution forbids taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." (U.S. Const., 14th Amend.) And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See, e.g., ***Monroe v. Pape***, 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; ***Felder v. Casey***, 487 U.S. 131, 148 [1988] [Section 1983 suits are enforceable in federal court "in the first instance"]; cf. *Screws v. U.S.*, 325 U.S. 91, 108 [1945].)[5]

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then *all* Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Steven J. Eagle, Regulatory Takings 1070 [2d ed. 2001].)

That property owners have been singled out is clear.[6] As one commentator concluded, "[t]he state compensation portion of [*Williamson County*] finds no parallel in the ripeness cases from other areas of the law."[7]

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[5] The lone exception is habeas corpus, where all issues (state and federal) must be raised in state court first. (28 U.S.C. § 2254[b].) However, once done, a habeas petitioner is not subjected to res judicata and full faith and credit barriers upon arriving in federal court. The issues may be argued afresh. (See, e.g, *Wainwright v. Sykes*, 433 U.S. 72, 80 [1977].)

[6] See, e.g., Daniel R. Mandelker, Land Use Law, § 2.24 at 2-32 (5th ed. 2003) ["The Supreme Court has adopted a special set of ripeness rules to determine whether federal courts can hear land use cases."]; John Delaney & Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse*, 31 Urb. Law. 195, 196 (1999) ["the ripeness and abstention doctrines have uniquely denied property owners, unlike the bearers of other constitutional rights, access to the federal courts on their federal claims"].

No parallel, indeed. The settled rule in other areas of substantive litigation under 42 U.S.C. § 1983 is that the federal forum is available at the plaintiff's demand, regardless of alternative remedies under state law:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." (*Monroe*, 365 U.S. at 183.)

Paradoxically, federal court protection is routinely provided in *some* land use cases — but only those involving aspects of the Bill of Rights *other than* the 5th Amendment's Just Compensation Clause. Federal court 1st Amendment cases abound, for example, in which the validity of local land use ordinances regulating or zoning for (or against) sexually explicit work has been challenged.[8] There is no requirement of first presenting the issues to state courts, even though they implicate the same zoning policies and land use ordinances as do other land use cases. Cases are thus decided in federal court, based on "local community standards," without initial state court suits. Similarly, whether an artistic or literary work is obscene under the 1st Amendment is determined by "contemporary community standards" and "applicable state law."[9] But state court judges do not have a monopoly on measuring the works against those local standards.

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[7] Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 (1995).

[8] E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

Nor have federal judges shown any hesitation to embroil themselves in local issues invoking the kind of neighborhood and family values typically involved in land use cases. In a celebrated zoning case, this Court concluded that:

> "[a] quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." (*Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 [1974].)

The Court of Appeals in that case had "start[ed] by examin[ing]" the zoning ordinance with reference to "the interest of the local community in the protection and maintenance of the prevailing traditional family pattern . . . ." (*Boraas v. Village of Belle Terre*, 476 F.2d 806, 815 [2d Cir. 1973].) If it is acceptable for a federal court to examine such intensely local and personal issues in the context of disapproving a proposed development planning pattern, how does it become unacceptable when a landowner wants to challenge regulatory restrictions on constitutional grounds?

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[9] *Miller v. California*, 413 U.S. 15, 24 (1973).

First Amendment cases dealing with the land use aspects of establishment of religion are also litigated in federal courts in the first instance.[10]

Moreover, at the behest of aggrieved citizens, federal courts have involved themselves in the local intricacies of city budget policy,[11] county law enforcement policy,[12] municipal policy governing the use of force during arrests,[13] county road acquisition policy,[14] municipal employment policy,[15] city medical care policy,[16] random drug testing of students,[17] school district sexual abuse policy,[18] police department sexual harassment policy,[19] and even the question whether "extortion of outsiders, businessmen, or developers" was town policy.[20] As this Court itself has noted, federal courts routinely review issues involving exercise of a state's sovereign prerogative, including the power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue bonds without a referendum, and a host of others.[21]

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[10] E.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994).

[11] *Berkley v. Common Council*, 63 F.3d 295 (4th Cir. 1995) (*en banc*).

[12] *Turner v. Upton County*, 915 F.2d 133 (5th Cir. 1990).

[13] *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996), *cert. den.* 117 S. Ct. 1086 (1997).

[14] *Hammond v. County of Madera*, 859 F.2d 797 (9th Cir. 1988).

[15] *Richardson v. Leeds Police Dept.*, 71 F.3d 801 (11th Cir. 1995).

[16] *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991).

Many of the cited cases deal with parallel features of the Bill of Rights, notably the Due Process Clause, routinely protected in federal court through 42 U.S.C. § 1983 — even against unconstitutional land use regulations. All sorts of local governmental issues are litigated in federal courts every day. And they involve all aspects of the Bill of Rights — except the 5th Amendment's Just Compensation Clause.

> "For years, federal lawsuits telling state and local governments how to run their hospitals, jails, police forces,

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[17] *Board of Education v. Earls*, 536 U.S. 822 (2002).

[18] *Gonzalez v. Ysleta Ind. School Dist.*, 996 F.2d 745 (5th Cir. 1993).

[19] *Gares v. Willingboro Twp.*, 90 F.3d 720 (3d Cir. 1996).

[20] *Roma Constr. Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996).

[21] *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191-92 (1959) [collecting cases] [retaining federal court jurisdiction over a state eminent domain case].

> and mental institutions have been accepted as a matter of course."[22]

There is nothing so special about land use cases as to insulate them from federal court review.

III.

THE WHOLE POINT OF 42 U.S.C. § 1983 WAS TO PROVIDE FEDERAL COURTS FOR THE PROTECTION OF FEDERAL RIGHTS

As this Court has repeatedly stressed, a § 1983 case is a "species of tort liability" (*Heck v. Humphrey*, 512 U.S. 477, 483 [1994]), specifically, a statutorily created "constitutional tort" (*Jefferson v. City of Tarrant*, 522 U.S. 75, 79 [1997]) that sweeps within its ambit all manner of governmental actions that defy Bill of Rights protections. Properly so. Section 1983 was intended to provide "a uniquely federal remedy" (*Mitchum v. Foster*, 407 U.S. 225, 239 [1972]) with "broad and sweeping protection" (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 [1972] [quoting with approval]) "read against the background of tort liability that makes a man responsible for the natural consequences of his actions" (*Monroe v. Pape*, 365 U.S. 167, 187 [1961], overruled in part, to expand government liability, in *Monell*, 436 U.S. 658) so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged (*Burnett v. Grattan*, 468 U.S. 42, 50, 55 [1984]).

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[22] Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Regional Planning Board v. Hamilton Bank, in Taking Sides on Takings Issues, ch. 20, p. 472 (ABA 2002; Thomas E. Roberts, ed.).

While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader " (*Kalina v. Fletcher*, 522 U.S. 118 [1997]), and must be broadly and liberally construed to achieve its goals (*Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 [1989]; *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 [1979]).

"[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors" (*Felder v. Casey*, 487 U.S. 131, 141 [1988]) by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights" (*Mitchum*, 407 U.S. at 243). *Williamson County's* state court litigation mandate inverted this basic building block of 42 U.S.C. § 1983: it interposed state courts to shield municipalities from federal accountability. It is time for this Court to end that practice.

CONCLUSION

Precedents are not cast away lightly. However, when scholars have been sharply critical of decisions,[23] when application of a precedent has produced a rule that "stands only as a trap for the unwary,"[24] when necessary to clarify the implications of earlier decisions,[25] when decisions of the Court are "if not directly . . . [conflicting,] are so in principle,"[26] or when "the answer suggested by [the Court's] prior opinions is not free of ambiguity,"[27] the Court has reviewed its earlier decisions and corrected its own errors. Each of those factors applies to *Williamson County*.

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[23] *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

Certiorari should be granted.

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[24] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[25] *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

[26] *Funk v. U.S.*, 290 U.S. 371, 374 (1933).

[27] *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

Respondents.

On Petition For A Writ of Certiorari To
The United States Court Of Appeals
For the Third Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders (NAHB) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and economic interests of its members and those similarly situated.

NAHB members provide 80% of all homes constructed in the United States; thus, NAHB members have a vested interest in the application and expansion of *Williamson County*'s state exhaustion ripeness requirement. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae's* intention to file this brief. All parties have consented. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The home building sector depends on clear regulatory and legal processes that do not infringe on constitutionally-protected property rights. The ability of property owners to have their constitutional claims heard predictably and transparently is vital to the interest of NAHB's members. Unfortunately, this Court's decision in *Williamson County* has had the opposite effect; not only confusing property owners but also creating chaos between the federal circuits.

NAHB is disturbed that the federal circuits have applied *Williamson County* in a manner that allows municipalities to use procedural gamesmanship to eliminate otherwise valid constitutional claims. This process effectively eliminates any federal forum for NAHB members to have their takings, due process, and equal protection land use claims heard.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH UNIFORMITY AMONG THE CIRCUITS ON THE APPLICATION OF *WILLIAMSON COUNTY* TO LAND USE CLAIMS.

Over 30 years ago, this Court created a two-part ripeness test applicable in whole to only one type of claim: regulatory takings. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *see e.g., Kurtz v. Verizon New* York, 758 F.3d 506, 514 (2d Cir. 2014) (In *Williamson County,* this Court "did not reach any issue of exhaustion" for any claims other than Fifth Amendment Takings).

In *Williamson County,* the Court held that regulatory takings litigants must meet two special conditions before their claims ripen. First, the plaintiff must show that the government's decision to take the property is final. Second, the plaintiff must exhaust all available state remedies for compensation. 473 U.S. at 191, 193. *See also* R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under Williamson County Has Yet to Be Made*, 67 Baylor L. Rev. 567, 575 (2015).

As Petitioner correctly notes, *Williamson County* has caused more conflict in federal takings litigation than any other takings principle. Petition for Writ of Certiorari at 2-4, *Rose Mary Knick v. Twp of Scott,* *Pennsylvania*, No, 17-647 (filed Oct. 31, 2017). The conflict is particularly prevalent with *Williamson County's* "state exhaustion" ripeness prong, which serves as a lock to the courthouse door for takings claims, "despite *Williamson County's* assurances that property owners are guaranteed access to court at some point." *Arrigoni Enterprises, LLC v. Town of Durham, Conn.*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *See also* John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195 (1999); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004).

Unfortunately, the application of *Williamson County* by the lower courts is not limited to federal takings claims. With no clarifying direction by this Court, lower courts are understandably split over the extent of *Williamson County*, including whether the state exhaustion ripeness requirement applies to substantive due process, procedural due process, and equal protection land use claims. There is a dire need for this Court to grant certiorari.

II. IN THE ABSENCE OF THIS COURT'S GUIDANCE, LOWER COURTS ARE CONFLICTED ON APPLICATION OF *WILLIAMSON COUNTY'S* STATE EXHAUSTION RULE TO CONSTITUTIONAL CLAIMS, INCLUDING DUE PROCESS AND EQUAL PROTECTION.

For well over a decade, it has been clear that Fifth Amendment Takings claims are separate and distinct from due process cases. *Lingle v. Chevron*, 544 U.S. 528 (2005). In *Lingle*, the Court determined that the "substantially advances legitimate state interests [test]" was not a proper takings standard. *Agins v. City v. Tiburon*, 447 U.S. 255 (1980), *abrogated by Lingle* at 542. By eliminating the substantially advances test, the Court separated due process claims from Fifth Amendment regulatory takings claims.

In *Lingle*, this Court admitted the *Agins* means-ends inquiry was one that "commingl[ed] of due process and takings inquiries," and that such "reliance on due process precedents" has "no proper place in [our] takings jurisprudence." *Id.* at 529; *see also Williamson County*, 473 U.S. 172, 197 (1995) ("The remedy for a regulation that goes too far, under the due process theory, is not 'just compensation', but invalidation of the regulation[.]"). Certainly, "[a takings] suit pursuing just compensation is entirely irrelevant to the validity of land use regulations, and has no effect on any facts relevant to [a due process] claim." Nader James Khorassani, *Must Substantive*

Due Process Land Use Claims be so "Exhaust" ing?, 81 Fordham L. Rev. 409, 443 (2012).

Perhaps not surprisingly, four of this Court's Justices voiced their concern that *Williamson County* should be reevaluated in the same year as the *Lingle* decision. *San Remo Hotel, L.P.* v. *City and County of San Francisco*, 545 U.S. 323, 348-52 (2005) (Rehnquist, C.J., concurring); *See also* Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play*, 30 Touro L. Rev. 297 n.13 (2014) (commenting that descriptions of *Williamson County* by lower courts include "unpleasant," "unfortunate," "unclear," "nonsense," "draconian," and "Kafkaesque")(citations omitted).

A decade afterward, this Court has done little to clarify the reach of *Williamson County* to land use constitutional claims other than federal takings. Without guidance by this Court, the circuit split has deepened over the applicability of *Williamson County* exhaustion requirements to substantive due process, procedural due process, and equal protection claims. In particular, some lower courts hold that *Williamson's* exhaustion prong is mandatory and extend it to due process and equal protection land use claims. Other courts treat *Williamson County* as rightly prudential, but this results in a confusing set of inter- and intra-circuit ripeness rules that are nigh impossible for a common property owner to comprehend. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997) (referring to *Williamson County's* "two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court.").

Other courts hold that *Williamson County's* exhaustion prong does not apply to due process or equal protection land use claims.

The circuit split is deep and ready for this Court's intervention.

A. The First, Seventh, and Tenth Circuits Apply *Williamson County's* Exhaustion Requirement to Due Process Land Use Claims.

The First, Seventh, and Tenth Circuits require property owners to exhaust state remedies to ripen substantive due process claims for federal court. In *Forseth v. Village of Sussex*, the plaintiffs attempted to develop a piece of property, but the village board president who lived immediately adjacent conditioned final approval upon a private conveyance of a buffer strip from the plaintiffs to him. 199 F.3d 363, 366 (7th Cir. 2000). The plaintiffs conveyed the strip and subsequently brought a claim in federal district court, claiming violations of substantive due process, equal protection, and takings. *Id.* at 367. Despite recognizing that plaintiffs bringing substantive due process claims in the land use context were not seeking just compensation, the court nevertheless applied *Williamson County* because the claim fell "within the framework for takings claims." *Id.* at 369. The court held that *Williamson County's* ripeness requirements are nearly absolute, noting that "we have yet to excuse any substantive due process claim[s] in the land-use context . . . ." *Id.*

The Seventh Circuit's stubborn refusal to allow due process claims in federal court extends to procedural due process. In *River Park, Inc. v. City of Highland Park*, the court held that "a property owner may not avoid *Williamson* by applying the label 'substantive due process' to the claim .... So too with the label 'procedural due process.' Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court." 23 F.3d 164, 167 (7th Cir. 1994).

The First Circuit applies exhaustion to substantive due process claims. In *Deniz v. Mun. of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002), the court refused to hear a due process claim, noting that "[d]ressing a takings claim in the raiment of a due process violation does not serve to evade the exhaustion requirement. Here as we have said, the inverse condemnation remedy represents an arguably available and adequate means of obtaining compensation for the alleged taking. Thus, no substantive due process claim will lie until that remedy is exhausted." *Deniz, quoting Ochoa*, 815 F.2d at 817 n.4; *See also Downing/Salt Pond Partners, L.P. v. Rhode Island and Providence Plantations*, 643 F.3d 16 (1st Cir. 2011) (noting that the court has "held that a plaintiff cannot, [evade *Williamson County*] merely by recasting its takings claim in the raiment of a due process violation.") (citations omitted).

The Tenth Circuit likely requires exhaustion, noting that due process or equal protection claims must satisfy *Williamson County* if the claims "rest upon the same facts as a concomitant takings claim."

Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996). In *Signature Properties Int'l Ltd. P'ship v. City of Edmond*, the plaintiff did not bring a Fifth Amendment Takings claim; yet, the court applied *Williamson County* and ruled that the plaintiff's substantive due process arbitrary and capricious claim was unripe. 310 F.3d 1258 (10th Cir. 2002). *See also, J.B., Ranch, Inc. v. Grand County*, 958 F.2d 306, 308 (10th Cir. 1992) (applying *Williamson County* to plaintiff's substantive due process claim because the facts of the case "fit squarely within the analysis developed in just compensation cases."); *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1298 n.19 (10th Cir. 2008) ("this court has held that, 'where the property interest in which a plaintiff asserts a right to procedural due process is coextensive with the asserted takings claim,' *Williamson County's* ripeness principle still applies.").

B. The Ninth and Second Circuits are Unable to Apply *Williamson County* in a Consistent and Fair Manner to Due Process and Equal Protection Claims.

Several federal courts have determined that due process and equal protection claims were ripe even though related takings claims were not ripe under *Williamson County*. These courts distinguish between a property owner's takings claim and other constitutional claims by holding that due process and equal protection claims are only subject to *Williamson County's* administrative finality prong. *See, e.g., McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997); *County Concrete Corp. v. Twp of*

Roxbury, 442 F.3d 159, 168-169 (3d Cir. 2006) ("The absence of 'just compensation' is not part of a due process or equal protection injury"). Not all courts, however, have been so clear.

An examination of Ninth Circuit jurisprudence is a prime example of how courts have been unable to apply *Williamson County* in a consistent and principled way. The Ninth Circuit has recognized that *Lingle* forecloses the ability of federal courts to hold that Fifth Amendment takings claims absorb other constitutional claims, like due process, in property rights cases. *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851 (9th Cir. 2007); *see also, A Helping Hand, LLC v. Baltimore Cty., MD.*, 515 F.3d 356, 369 n.6 (4th Cir. 2008); *Rose Acre Farms, Inc. v. U.S.*, 559 F.3d 1260, 1277 (Fed. Cir. 2009). Here, the court explained that "*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct." *Crown Point* at 855.

However, it is not clear whether the Ninth Circuit requires exhaustion for due process and equal protection claims. *See e.g., Hoehne v. Cty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (holding that *Williamson County's* finality requirement applies to due process and equal protection, but not commenting similarly on exhaustion.); *but see Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 831 (9th Cir. 2003) (there are "certain limited and appropriate circumstances" where 42 U.S.C. § 1983 claims may be ripe even when related Fifth Amendment Takings claims are unripe). More recently, a federal district court has held that "it would be illogical to require a plaintiff to seek compensation in state proceedings for a due process violation, because such violations, if proven, are not remedied by 'compensation.'" *Surf and Sand, LLC v. City of Capitola*, 717 F.Supp.2d 934 (N.D. Cal. 2010); *See also Guggenheim v. City of Goleta*, 638 F.3d 111 (9th Cir. 2010) (commenting that "*Williamson* is the law by which we are bound" but "[w]ith all due respect [to this Court], we do not think the Constitution requires [an exhaustion requirement].")

Other Circuits mirror the Ninth Circuit in the ambiguity of whether substantive due process, procedural due process, and equal protection[2] claims are subject to *Williamson County's* exhaustion requirement.

For example, the Second Circuit admittedly applies a complex set of rules to determine whether constitutional claims are subject to any of *Williamson County's* requirements. *Kurtz v. Verizon New York, Inc.*, 738 F.3d 506, 514 (2d Cir. 2014). ("After *Williamson County*, courts have attempted to settle questions of ripeness in the several contexts of due process claims: substantive or procedural; substantive claims alleging regulatory overreach or those alleging arbitrary and capricious conduct; claims arising from the same nucleus of fact as a takings claim, or not; and regulatory or physical takings. Myriad permutations can result.").

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[2] Even the Seventh Circuit, which applies a bright line state exhaustion rule to due process claims, is less confident with equal protection claims. *See Forseth* at 371. (holding that the plaintiff's equal protection claim was not subject to *Williamson County* in the land use context when the plaintiff can show "circumstances . . . that sufficiently suggest that the plaintiff has not raised just a single takings claim with different disguises"); *But see Unity Ventures v. Cty. Of Lake*, 841 F.2d 770, 774-75 (7th Cir. 1988) (holding that Williamson County "applies as well to equal protection and due process claims" in land use cases).

In *Southview Associates, Ltd. v. Bongartz*, the Second Circuit held that substantive due process claims alleging regulatory overreach must satisfy both the finality and exhaustion prongs of *Williamson County*. 980 F.2d 84, 96 (2d Cir. 1992). However, claims alleging arbitrary and capricious conduct by the government must only meet *Williamson County's* finality requirement, not exhaustion. *Id.* at 97; *see also Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 381 (2d Cir. 1995). At the same time, the Second Circuit further confuses the issue by holding that *Williamson County* "has been extended to equal protection and due process claims asserted in the context of land use challenges." *Kurtz* at 515, citing *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349-50 (2d Cir. 2005).

C. Government Entities Utilize *Williamson County* to Evade Their Constitutional Obligations.

Due to the confusion caused by *Williamson County*, defendant governments bob and weave through *Williamson County's* ripeness maze, allowing them to evade liability for takings, due process, and equal protection claims. The typical defendants in a land use case "are municipal bodies, often at the local level, that are inherently slow moving and that possess numerous incentives to delay their final decisions." Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 45 (1995).

In a few instances, courts catch on. In *Sherman v. Town of Chester*, the locality used delay tactics for over 10 years, forcing a developer to spend $5.5 million on top of the $2.7 million purchase price in his attempts to obtain a subdivision approval. 752 F.3d 554 (2d Cir. 2014). The gamesmanship by the locality continued into the courtroom. In 2007, Sherman filed suit in federal court. The Town made a motion to dismiss based on *Williamson County* and Sherman voluntarily withdrew the case. Once Sherman brought a claim in state court, the Town removed the case back to federal court, where it moved again to dismiss in part on ripeness grounds.

The Second Circuit recognized the absurdity throwing out a federal takings claim under *Williamson* County ripeness rules when the government removes a case to federal court. The Second Circuit, relying a Fourth Circuit case, held that "refusing to apply the state-litigation requirement in this instance ensures that a state or its political subdivision cannot manipulate litigation to deny a plaintiff a forum for his claim." *Sherman* at 564, citing *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013).

Unfortunately, government defendants are often successful in dismissing cases after removing them from state to federal court. The litigation landscape is littered with cases that have been removed from state court to federal court, only to be dismissed under *Williamson County*. *See, e.g.*, J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' Prudential Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 335 n.79 (2014) (providing numerous examples of cases dismissed under *Williamson County* after defendant removed case from state to federal court).

It should not be that a case that is fully ripe in state court suddenly becomes unripe the moment a government defendant removes the case from state to federal court. Home builders and all other property owners deserve more constitutional certainty than this.

CONCLUSION

The Court should no longer delay its reconsideration of the exhaustion of state remedies rule. When this Court decided *Williamson County* in 1985, modern takings jurisprudence was in its infancy. Indeed, only after *Williamson*, in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), did this Court even decide that monetary compensation was the self-effecting remedy required by the Takings Clause. Since then, the contours of the Fifth Amendment's substantive protections have been analyzed by this Court, but the most fundamental jurisdiction question – "Can a federal court decide a federal takings, due process, or equal protection land use claim?" – remains unanswered. The confusion caused by *Williamson County* is vast and requires this Court's intervention. *Amicus* urges the Court to grant certiorari.

Dated: December 4, 2017

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No. 17-647

In The
Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF AMICUS CURIAE OF WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should this Court overrule its holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, that plaintiffs wishing to file a Fifth Amendment takings claim in Federal District Court under 42 U.S.C. § 1983 are first required to "seek compensation through the procedures the State has provided for doing so?"

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, the Western Manufactured Housing Communities Association (WMA) submits this brief amicus curiae in support of Petitioner Rose Mary Knick.[1] WMA is a statewide trade association representing the owners of 1,700 manufactured/mobilehome communities throughout California, containing approximately 180,000 homes. WMA was founded in 1945 and is the largest and oldest trade association representing community owners in California and in the United States. WMA is a 501(c) (3) mutual benefit nonprofit corporation whose mission is to preserve and promote the interests of manufactured/mobilehome community owners, operators and developers. WMA's activities include educational programs and legislative and judicial advocacy, including amicus curiae appearances in leading cases before this Court, the Ninth Circuit Court of Appeals, and the California Supreme Court.

WMA's members are interested in this case because it presents an opportunity for the Court to remedy an injustice that plagues park owners and other property owners across the nation: the inability to seek vindication of their Fifth Amendment rights in federal court. WMA's members have been among the many property owners who have been barred by

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[1] The parties have filed with the Clerk letters granting blanket consent to the filing of amicus curiae briefs in this case. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City from obtaining a federal-court remedy for violations of the Takings Clause. *See, e.g., Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824 (9th Cir. 2004); *Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948 (9th Cir. 2011).

WMA seeks to provide the Court with an additional viewpoint on the origins and development of *Williamson County*'s requirement that plaintiffs must submit their Fifth Amendment takings claims to state courts in order to "ripen" them for federal adjudication. This requirement was based on no preexisting judicial doctrine, nor did it emerge from the deliberations of any lower courts. In effect, *Williamson County*'s state litigation requirement was created on the spot, out of whole cloth. In view of this rule's disastrous, largely unforeseen, consequences for property owners attempting to vindicate their Fifth Amendment rights, WMA and its members believe this Court can best serve the interests of justice by overruling it, and once again allowing takings claims against local governmental entities to be taken directly to federal court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a fundamental injustice that has become all too common over the past 33 years. When Scott Township violated Petitioner Rose Mary Knick's rights under the Takings Clause of the Fifth Amendment to the United States Constitution, Ms, Knick filed suit in Federal District Court under 42 U.S.C.§ 1983, asking that the Township be required to comply with its constitutional obligations. Yet despite the frequently reiterated obligation of the federal courts to exercise the jurisdiction granted them by Congress under Article III, the District Court dismissed Ms. Knick's takings claim, and directed her to seek a remedy in the Pennsylvania State courts. The dismissal was upheld by the Third Circuit Court of Appeals, under the "ripeness" doctrine established by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1986).

Williamson County's so-called state litigation requirement – under which a Fifth Amendment takings claimant is required to seek just compensation in state court to "ripen" her federal takings claim – is an anomaly in constitutional law and should be overruled. As this brief amicus curiae will demonstrate, the state litigation rule was injected into the *Williamson County* case at the last minute by a single amicus brief filed in this Court. Although the *Williamson County* opinion attempts to find support for the new rule by analogy to procedural due process cases and suits seeking compensation from the United States in the Court of Federal Claims, there was in fact no doctrinal support for the state litigation rule in constitutional text or case law, nor is there any now.

Because the state litigation rule was coined on the spur of the moment, its full ramifications had not been fully thought out. Consequently, the rule was modified and adjusted over the years, until this Court's decision in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005) confirmed that, in conjunction with standard principles of issue preclusion and the Full Faith &

Credit Act, complying with *Williamson County* did not "ripen" federal takings claims; it extinguished them. At this point the state litigation requirement had morphed into the very opposite of what the *Williamson County* Court intended.

Finally, although some commentators have sought to ground the state litigation rule in principles of federalism, this effort is misguided. As Chief Justice Rehnquist observed in his *San Remo* concurrence, no such principles were involved in the *Williamson County* decision, and none have developed since then. 545 U.S. at 350.

ARGUMENT

I.

THE STATE LITIGATION REQUIREMENT SPRANG INTO EXISTENCE *EX NIHILO* BEFORE THIS COURT, WITHOUT BENEFIT OF PRIOR BRIEFING OR ARGUMENT IN ANY LOWER COURT

A. Certiorari Was Granted in *Williamson County* to Determine Whether Compensation Is Required for a Temporary Regulatory Taking

The *Williamson County* case originally had nothing to do with ripeness, much less with establishing the proper court in which to sue for a taking. In the early 1980s, in the wake of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the burning question in takings law was whether the Fifth Amendment demanded just compensation when a regulation effectively deprived an owner of the use of his property, or if rescinding the offending measure was an adequate remedy.

In *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), the California Supreme Court had recently announced that the only remedy available for a regulatory taking in the courts of that state was invalidation of the offending measure. This Court agreed to review *Agins* to determine whether a compensation remedy is required when land-use regulations violate the Takings Clause. But instead, the Court ruled that since the restrictions in *Agins* did not rise to the level of a taking, the hypothetical availability of compensation was irrelevant. *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980).

Just days after handing down its decision in *Agins*, this Court again took up the compensation issue in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). In that case, as in *Agins*, a California court had dismissed a takings claim on the grounds that just compensation for a regulatory taking was not available in that state as a matter of law, and the constitutional propriety of that policy was the sole question presented to this Court. A majority in *San Diego Gas*, however, ultimately dismissed the appeal on the grounds that the California judiciary had not yet rendered a final decision on whether a taking had in fact occurred. *Id.* at 633.

Most observers expected this issue would at last be resolved when the Court agreed, three years later, to hear *Williamson County*. Unlike in *Agins* and *San Diego Gas*, Hamilton Bank's takings claim had been fully adjudicated by a trial court. A federal jury had found that the county's denial of required development permits effected a violation of the Takings Clause, and awarded $350,000 in compensation for the temporary taking of the undeveloped portion of the property. The Court of Appeals affirmed, establishing for the first time that "compensation must be paid for a temporary regulatory taking." *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d 402, 409 (6th Cir. 1984). The Commission's petition for certiorari to this Court was granted "to address the question whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Williamson County*, 473 U.S. at 185. This was the issue addressed by Williamson County's opening brief on the merits, as well as by 26 of the 27 amicus briefs filed in the case. But one amicus brief diverged from the question on which certiorari had been granted, and in doing so, led this Court down a disastrous doctrinal cul-de-sac that would wreak havoc with takings law for more than 30 years.

B. The Amicus Brief for the United States Argued – for the First Time at Any Stage of the Litigation – That the Case Should Have Been Dismissed Because Hamilton Bank Had Not Sought Just Compensation Through State Procedures Before Suing in Federal Court

The amicus brief filed by the Solicitor General on behalf of the United States addressed a different question, one that had not been raised by the parties or considered by the courts below:

> "Whether, under this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), respondent's claim that its property was taken without just compensation in violation of the Fifth and Fourteenth Amendments should have been dismissed because respondent did not pursue procedures under state law to obtain compensation or show that those procedures are inadequate."

Williamson County, Brief for the United States as Amicus Curiae Supporting Petitioners, at 1. This was a startling and puzzling proposition. No Supreme Court opinion had ever suggested that plaintiffs complaining of a violation of the Takings Clause were required to seek compensation in any other venue before filing an action under 42 U.S.C. §1983 in federal court. Second, the issue had not been raised, briefed, or argued at any point in the previous thirty months of litigation, nor did the Williamson County Regional Planning Commission itself ever address the possibility that the takings claim against it was not ripe.

This Court normally seeks to guard against deciding important questions of first impression without guidance from the deliberations of lower courts. Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition [for certiorari], or fairly included therein, will be considered by the Court." Adhering to this rule, the Court has noted, "helps ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993). The Court continued: "[f]aithful application [of Rule 14.1(a)] will also inform those who seek review here that we continue to strongly 'disapprove the practice of smuggling additional questions into a case after we grant certiorari.'" *Id.* (quoting *Irvine v. California*, 347 U.S. 128, 129 (1954)).

Similarly, the Court has often expressed its reluctance to allow litigants to raise issues that were not argued and decided in the proceedings below. When a case has been litigated through the federal courts, it is only in "exceptional" circumstances that the Court will consider a question that was not fully vetted and passed upon below, even if it is squarely presented in the petition for certiorari. *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980). The rationale underlying this policy was succinctly summed up by one commentator: "Better ten wrong decisions in the lower courts than one half-baked opinion from the Supreme Court." Stewart A. Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 618 (1984). Nevertheless, the Solicitor General's historic introduction of a new issue into the Court's

Williamson County deliberations, like a genie that escapes its bottle, could not be contained.

Hamilton Bank's opposition brief disposed of the Solicitor General's proposed analogy between takings cases and the procedural due process issue posed by *Parratt v. Taylor*. In *Parratt*, a prison inmate sued the warden, alleging that the prison's loss of some hobby materials the prisoner had ordered deprived him of property without due process of law, in violation of the Fourteenth Amendment. *Parratt*, 451 U.S. at 529-30. The Court ruled that there had been no due process violation because the loss of the materials resulted from prison employees' random and unauthorized acts, rather than from any established procedure. The availability of a tort remedy under state law therefore provided the inmate with an adequate means of redress for his loss that satisfied the requirements of due process. *Id.* at 543–44. Hamilton Bank pointed out to the *Williamson County* Court that the regulatory taking at issue in that case, like virtually all takings effected by the application of restrictive land-use regulations, occurred only after exhaustive formal proceedings as a matter of legislative or administrative policy. Since no random, unauthorized, or even unforeseen acts were involved, *Parratt* was clearly inapposite and there was no logical bar to seeking a "post-deprivation remedy" (i.e., just compensation) in federal court. Brief for Respondent, *Williamson County*, 473 U.S. 172 (No. 84-4), U.S. S. Ct. Briefs LEXIS 1235, at *68-69.

Hamilton Bank's brief also corrected the Solicitor General's assertion that just compensation for the taking would have been available under Tennessee law, if the case had been filed in state court. *Id.* at *67 n.16. The fact that Tennessee's inverse condemnation procedures applied only to takings effected by physical occupation, and therefore offered no possible remedy in this case, was reiterated at oral argument without questioning from the Court. Transcript of Oral Argument, *Williamson County*, 473 U.S. 172 (No. 84-4), 1985 U.S. Trans LEXIS 76, at *36-37. In general, scant attention was given to the Solicitor General's peculiar digression at oral argument, at the conclusion of which there was little reason to suppose it would play any role in the Court's decision.

C. Ultimately, the *Williamson County* Majority Crafted a New Ripeness Doctrine Out of Whole Cloth, Based Largely on Behind-the Scenes Debate and Negotiations Within the Court Itself

Following oral argument, the *Williamson County* Court seemed uncertain how to dispose of the case. Justice Blackmun, who was assigned to write the majority opinion, candidly recorded his impression that "I am not sure I fully understand this case." *See* hand-written note dated February 18, 1985. Library of Congress: Harry A. Blackmun Papers, Box No. 425, case folder 84-4. Justice Rehnquist, who had reservations about treating the case as coming under the Takings Clause at all, seemed taken with the alternative of reversing on ripeness grounds, but only if Justice Blackmun would tie the rationale for dismissal to *Parratt*. *See* Memorandum from Justice Rehnquist to Chief Justice Warren Burger dated Feb. 25, 1985. Library of Congress, *id.* Eventually, despite the urging of his clerk – a future distinguished law professor at New York University – that it was "dangerous to leave the impression that *Parratt* is directly analogous to takings claims," Justice Blackmun acquiesced. *See* Memorandum from Vicki Been to Justice Blackmun dated June 12, 1985. Library of Congress, *id.*

Justice Blackmun's majority opinion, issued on June 28, 1985, began by acknowledging the Court's two previous failures to resolve the necessity of a compensation remedy for temporary takings, but once more set aside this issue "for another day." *Williamson County,* 473 U.S. at 185. Hamilton Bank's claim for compensation was found to be premature because a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," which had not occurred in this case. *Id.* at 186. But then, having already disposed of the takings claim as unripe for lack of a final decision, Justice Blackmun went on to set out a "second reason" for reversing the Sixth Circuit: because the property owner "did not seek compensation through the procedures the State provided for doing so." *Id.* at 194. The opinion took pains to avoid labeling this holding for what it was — an unprecedented requirement, coined on the spur of the moment, without briefing or argument in the lower courts. However, Justice Blackmun's efforts to ground the state procedures requirement in the Court's previous jurisprudence merely highlighted the absence of any plausible rationale for the new rule.

II.

THE STATE LITIGATION REQUIREMENT WAS BASED ON NO PREEXISTING LEGAL PRINCIPLE OR DOCTRINE

A. The *Williamson County* Court Struggled Futilely to Find Some Doctrinal Anchor for Its Newly Minted Ripeness Requirement

Though repeatedly claiming to have some basis in previous decisions, Justice Blackmun's majority opinion in *Williamson County* struggled futilely to find some doctrinal anchor for the state litigation requirement. Forming a majority for dismissal on ripeness grounds had depended on crafting some sort of analogy to the due process rule of *Parratt v. Taylor*, yet Hamilton Bank's opposition brief on the merits had plainly demonstrated that no such analogy could validly be drawn. The result was a Jekyll-and-Hyde approach, clinging to the *Parratt* analogy on the one hand, while admitting it actually had no application to the case.

Echoing the issue presented by the Solicitor General's amicus brief, the *Williamson County* opinion began by asserting:

> The recognition that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation is analogous to the Court's holding in *Parratt v. Taylor*.

473 U.S. at 195. Yet only a few sentences later, a footnote acknowledges what Hamilton Bank had pointed out in its opposition brief:

> The analogy to *Parratt* is imperfect because *Parratt* does not extend to situations such as those involved [in this case], in which the deprivation of property is effected pursuant to an established state policy or procedure, and the State could provide predeprivation process.

Id. at 195 n. 14. Yet even though this recognition completely obviated any correspondence between *Parratt* and a typical regulatory takings claim, Justice Blackman shored up the defective analogy by simple assertion:

> Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not 'complete' until the State fails to provide adequate compensation for the taking.

Id. at 195. This sentence is notable because of its critical ambiguity: both the Williamson County Regional Planning Commission and the Tennessee state courts are referred to as "the State," suggesting some institutional identity between the entity responsible for the taking (the Commission), and one capable of requiring the Commission to comply with its constitutional obligation to pay compensation (the state judiciary). But the identification of the two public entities is plainly spurious. Had the final clause read, "the Planning Commission's action here is not 'complete' until the Tennessee state courts fail to order it to provide adequate compensation for the taking," the underlying non sequitur would have been obvious. Why should it be the special responsibility of the Tennessee state courts, rather than the United States District Court for the Middle District of Tennessee, to enforce the terms of the federal Constitution on a county agency? Because that fundamental question was addressed nowhere in the *Williamson County* opinion, Justice Blackmun's comparison to *Parratt* ultimately amounted to little more than a distraction.

B. In a Second Flawed Analogy, *Williamson County* Misconstrued the State Judiciary as the Functional Equivalent of the Court of Federal Claims

Having all but abandoned any serious reliance on *Parratt* in footnote 14, Justice Blackmun's search for doctrinal support for the state litigation rule landed upon an even more peculiar analogy, with *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). The *Monsanto* Court, according to *Williamson County*, "held that takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U.S. at 195. Yet the "process provided by the Tucker Act" is simply a suit for just compensation for the taking, filed in the Court of Federal Claims. Under the Act, 28 U.S.C. § 1491, the Court of Federal Claims has exclusive jurisdiction over claims for monetary damages against the United States in excess of $10,000 that arise under the Constitution, including Fifth

Amendment takings claims. No other court, at any level, has original jurisdiction to hear to such claims. The passage in ***Monsanto*** cited by Justice Blackmun stands for the proposition that declaratory and injunctive relief are not available as remedies for a taking by the federal government, regardless of the forum. Monsanto's claim for equitable relief was "premature" only in the sense that the plaintiff had sought (and been granted) the wrong remedy.

But *Williamson County*'s citation to ***Monsanto*** was not unique. Indeed, every takings case cited in this section of the opinion – every case, that is, except the concededly irrelevant procedural due process claims – dealt with the hypothetical or actual availability of compensation from the federal government in the Court of Federal Claims or its predecessor, the Court of Claims. This suggests another flawed analogy at work in crafting the state litigation requirement: A takings case against the federal government filed in federal district court would be dismissed because the proper forum to hear such a claim is the Court of Federal Claims. Similarly, a takings suit against a governmental subdivision of a State filed in federal district court should be dismissed, because the proper forum to hear such a claim is the courts of that State.

The Court of Federal Claims, however, has been granted exclusive jurisdiction by Congress to hear Fifth Amendment takings claims brought against the federal government. The state courts hold no such exclusive jurisdiction over takings claims brought against state and local entities, and in fact, 42 U.S.C. § 1983 creates a federal cause of action to redress such claims. Once again, *Williamson County*'s attempt to find some doctrinal support for the state litigation requirement, even by analogy, was unavailing.

C. At Bottom, the State Litigation Requirement Rested On an Implicit Non Sequitur

The sole remaining jurisprudential prop for the state litigation requirement was Justice Blackmun's famous truism, as self-evident as it is devoid of meaning in this context: "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. Obviously, plaintiffs do not bring suit for a violation of the Takings Clause unless they can allege there has been a taking without just compensation; that is the gravamen of the complaint. The question the *Williamson County* Court chose to decide without addressing was, what is the proper court in which to adjudicate such complaints? The Court's implied syllogism was:

> **A.** A taking does not violate the Constitution unless it is without compensation;
>
> **B.** Most states have judicial procedures for obtaining compensation for a taking; therefore
>
> **C.** Until a plaintiff has utilized these state procedures and been denied compensation, there has been no constitutional violation.

But this would only hold true if the state procedures of Premise **B** were the only way to obtain compensation. In fact, Premise **B** should read:

> **B.** Most states and the federal courts have judicial procedures for obtaining compensation for a taking.

This correction makes it clear that the Court's conclusion was simply a non sequitur. What's needed is an additional premise, providing a reason to require that compensation be sought only in the state courts, instead of their federal counterparts.

Unfortunately, Justice Blackmun's tautological recitation of the constitutional text sheds no light whatsoever on that question. Yet the line, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation" was destined to become virtually a mantra, endlessly repeated over the next three decades by federal judges as the basis for dismissing fully ripe Fifth Amendment claims by litigants who had come before them to establish that their property had been taken without just compensation.

At the time *Williamson County* was handed down, almost no commentators grasped the full significance of the new state litigation rule. The most common reaction to the opinion was frustration that the Court had once again failed to reach the issue of whether compensation is required for a temporary taking. Some analysts casually reported the new state litigation requirement as if it were quite unproblematic. Only Henry Paul Monaghan, writing in the Columbia Law Review, seemed to grasp the fundamental incoherence of the Court's new doctrine, and its potential implications for the future of takings law:

> No authority supports the use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked. . . . Ripeness is concerned only with the timing of access to the district courts; but *Parratt* completely bars access, if the state corrective process is adjudged "adequate."

Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989–90 (1986). The full significance of that observation would gradually be brought home to takings plaintiffs over the coming decades.

III.

BECAUSE *WILLIAMSON COUNTY'S* NEW "RIPENESS" RULE RESTED ON NO PRE-EXISTING CONSTITUTIONAL DOCTRINE, ADDITIONAL FACETS OF THE RULE HAVE BEEN ADDED HAPHAZARDLY OVER TIME, AS THE COURT DISCOVERED THEM IN RESPONSE TO THE CIRCUMSTANCES OF PARTICULAR CASES

Largely because the state litigation rule was grounded in no preexisting doctrine, the requirement has never fit comfortably within the overall body of federal practice and procedure. This has resulted in a series of ad-hoc revisions and adjustments to *Williamson County*'s "ripeness" doctrine over time, at first merely resulting in contradictory and inexplicable applications of the rule, but eventually changing its very nature from what the *Williamson County* majority envisioned.

For example, in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 174 (1997), the Court held that a governmental defendant that was sued for a taking in state court could properly remove the claim to federal district court. By statute, removal is proper only for claims over which "the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Under *Williamson County*, however, the district courts would not have jurisdiction over a takings claim against a city until it had been fully litigated in state court – the very thing that is prevented by removal!

College of Surgeons therefore established an unprecedented procedural asymmetry in federal law: takings plaintiffs could not file their claims in federal court initially, but governmental defendants could remove them there from state court, if they so desired. Frankly observing that the juxtaposition of *Williamson County* and *College of Surgeons* was "anomalous," the Eighth Circuit Court of Appeals concluded that how to resolve that conundrum "is for the Supreme Court to say, not us." *Kottschade v. City of Rochester*, 319 F. 3d 1038, 1041 (8th Cir. 2003). Yet the Court declined the Eighth Circuit's invitation to resolve this seemingly contradictory treatment of takings plaintiffs and defendants, which remains anomalous to this day.

The same year *College of Surgeons* was handed down, in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733–34 (1997), the Court for the first time characterized the state litigation requirement as a "prudential" ripeness hurdle. Although *Suitum* involved only *Williamson County's* first prong, requiring administrative finality, Justice Souter's decision noted that *Williamson County* established "*two* independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court." *Id.* (emphasis added). This point was reiterated in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 707 (2010), wherein the majority noted that the petitioner's failure to seek just compensation in state court did not bar its Fifth Amendment takings claim, because the state litigation requirement was not jurisdictional. *Id.* at 728-29.

The idea that the state litigation rule is prudential, suggesting that federal judges were free to waive the requirement on a case-by-case basis, seems wholly incompatible with the reasoning of *Williamson County* itself. Justice Blackmun's insistence that a violation of the Takings Clause was not "complete" until the plaintiff had sought and been denied just compensation through state procedures cannot be squared with the possibility that an Article III court could exercise jurisdiction over such a claim even though that "ripening" requirement had not been met.

It is probably the case that "[t]he conversion of the state litigation rule into a prudential concept . . . arises from the persistent, general consensus that the requirement is not a well-reasoned or functional ripeness concept." J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 347-48 (2014). But in any case, such a shift in understanding certainly cannot be accounted for by anything in *Williamson County* itself.

While this new interpretation allowed an occasional takings plaintiff to slip through the federal courthouse door on a random and unpredictable basis, *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, slammed that door shut on plaintiffs who attempted in good faith to "ripen" their federal claims as *Williamson County* required. In *San Remo*, the Court held that, once just compensation for a taking has been sought and denied in state court – as required by *Williamson County* – issue preclusion would prevent litigating the "ripened" takings claim in federal court – as promised by *Williamson County*. 545 U.S. at 327.

Justice Stevens's unanimous *San Remo* opinion framed the issue as one of refusing to "[give] losing litigants access to an additional appellate tribunal," *id.* at 345, and extolled the competence of state judges to hear federal takings claims. *Id.* at 347. But totally absent from the opinion was any justificatory rationale for forcing federal takings claimants to face issue preclusion by relegating their cases to state court in the first place. *Williamson County's* state litigation requirement was simply taken as given, and if that rule had the effect of barring plaintiffs from asserting violations of their federal constitutional rights in federal court, the majority saw no grounds for concern. In place of the Court's historical affirmation of the need to assure that all citizens have access to the federal courts under 42 U.S.C. § 1983 (*see Mitchum v. Foster*, 407 U.S. 225, 242 (1972)), Justice Stevens noted dismissively, "it is entirely unclear why [petitioners'] preference for a federal forum should matter for constitutional or statutory purposes," 545 U.S. at 344, and declared it "hardly a radical notion" to permanently consign federal constitutional claimants to state court. *Id.* at 346-47.

What is most evident about the *San Remo* opinion is that it dispenses once and for all with any pretense that the state litigation requirement has anything to do with ripeness.

> The *San Remo Hotel* Court barely discussed ripeness in reaching its holding. . . . [The] decision spends more time discussing comparative competency, suggesting that the Court was more focused on . . . judicial economy than defining the record.

Eric A. Lindberg, *Multijurisdictionality and Federalism: Assessing San Remo Hotel's Effect on Regulatory Takings*, 57 UCLA L. Rev. 1819, 1860–61 (2010). *San Remo* established beyond question that the fundamental conceptual basis of *Williamson County* – that federal takings claims are merely "premature" until compensation has been sought from the state, 473 U.S. at 197, whereupon litigants may return to a federal forum to vindicate their federal constitutional rights – was simply mistaken. After 20 years of case-by-case evolution, the state litigation requirement in *San Remo* had finally morphed into the antithesis of itself.

But if sending federal takings claimants to state court cannot ripen their federal claims, why should they be sent there at all? This question, that was never squarely faced in *Williamson County*, was simply ignored in *San Remo.* In a perverse way, it was as if *Williamson County* finally had become genuinely analogous to *Parratt v. Taylor,* and Professor Monaghan's words (see above at page 18) could now be revised to:

> Ripeness is concerned only with the timing of access to the district courts; but [*Williamson County*] completely bars access, if the state corrective process is adjudged "adequate."

IV.

THE STATE LITIGATION REQUIREMENT DID NOT SPRING FROM FEDERALISM CONCERNS

It is sometimes suggested that *Williamson County*'s relegation of federal takings claims to state court may originate in a concern for principles of federalism. See John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine "Ripeness" Doctrine in Takings Litigation,* 43 Envtl. L. Rep. News & Analysis 10735, 10748 (2013) ("The just-compensation prong of *Williamson County* ripeness doctrine . . . has nothing to do with ripeness and everything to do with federalism."); Michael R. Salvas, *A Structural Approach to Judicial Takings,* 16 Lewis & Clark L. Rev. 1381,1384 n.7 (2012) (*Williamson County* "reflect[s] a concern on the Court for federalism in the takings context"); Lindberg, *Multijurisdictionality and Federalism, supra,* at 1853 ("Principles of federalism help explain why it makes sense to delegate the majority of regulatory takings litigation to state courts.");

Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion under Williamson County*, 26 Ecology L.Q. 1, 47 (1999) ("State court enforcement of federal law is . . . central to the principle of federalism.")

Nothing, however, in the *Williamson County* decision or the record of the Court's deliberations, supports the idea that federalism played any role in banning Hamilton Bank's takings claim from federal court. Moreover, federalism has not been mentioned in any of this Court's subsequent references to the state litigation requirement. Chief Justice Rehnquist, who was a member of the *Williamson County* majority, noted in his *San Remo* concurrence that "[t]he Court today makes no claim that any . . . longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed." *San Remo*, 545 U.S at 350 (Rehnquist, C.J., concurring in the judgment). The Chief Justice went on to point out that *San Remo*'s invocation of greater state-court familiarity with local land use disputes is not comparable to "the type of historically grounded, federalism-based interests" that justify the relegation of other claims to state court. *Id.* The lower federal courts have been similarly reticent to tie *Williamson County*'s state litigation requirement to any concern for federalism.

Finally, the clearest indication that federalism is not an animating force behind the state litigation requirement is the doctrinal asymmetry introduced by *City of Chicago v. International College of Surgeons*. While plaintiffs asserting a regulatory taking must file their claims in state court under *Williamson County*, governmental defendants in those same cases enjoy unimpeded access to a federal forum, if they choose, by asserting removal jurisdiction. 522 U.S. at 160-61, 174. Once a case has been removed at the defendant's behest, a federal judge goes about the routine business of hearing evidence concerning the impact of regulatory restrictions on the property at issue, with no more concern for the supposed complexities of state land-use law than would pertain in hearing a pendant state claim for trespass or a quiet-title action. It is quite impossible to advance a federalism-based rationale for relegating plaintiffs raising regulatory takings claims to state court, while permitting defendants to have the identical claims adjudicated in a federal forum, should they choose to do so.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision below and overrule *Williamson County's* holding that Fifth Amendment takings claims are not ripe for adjudication in federal court until the plaintiff has sought compensation through state procedures.

DATED: May, 2018.

Respectfully submitted,

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No. 17-647

In The

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO,
Individually and in his Official Capacity as Scott
Township Code Enforcement Officer,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari filed October 31, 2017
Petition for Writ of Certiorari granted March 5, 2018

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Chronological List of Relevant Docket Entries

United States District Court
for the Middle District of Pennsylvania
Knick v. Township of Scott
Case No. 3:14-cv-02223-ARC

Dkt.	Date	Description
1	Nov. 20, 2014	Complaint
7	Jan. 20, 2015	Motion to Dismiss
8	Feb. 3, 2015	Brief in Support of Motion to Dismiss
9	Feb. 16, 2015	Amended Complaint
10	Mar. 2, 2015	Motion to Dismiss Plaintiff's Amended Complaint
12	Mar. 20, 2015	Brief in Support of Defendants' Motion to Dismiss Plaintiff's Amended Complaint
14	Mar. 31, 2015	Brief in Support of Defendants' Motion to Dismiss Plaintiff's Amended Complaint
15	Apr. 14, 2015	Plaintiff, Rose Mark Knick's Brief in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint

Dkt.	Date	Description
16	Apr. 28, 2015	Reply to Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint
19	Oct. 29, 2015	Memorandum
20	Oct. 29, 2015	Order
21	Nov. 16, 2015	Second Amended Complaint
22	Nov. 30, 2015	Motion to Dismiss Plaintiff's Second Amended Complaint
24	Dec. 14, 2015	Brief in Support of Motion to Dismiss Plaintiff's Second Amended Complaint
26	Dec. 22, 2015	Plaintiff's Opposition to Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint
27	Jan. 5, 2016	Defendant Scott Township's Reply to Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint

Dkt.	Date	Description
34	Sept. 8, 2016	Memorandum
35	Sept. 8, 2016	Order
36	Sept. 9, 2016	Notice of Appeal

Chronological List of Relevant Docket Entries

United States Court of Appeals
for the Third Circuit
Knick v. Township of Scott
Case No. 16-3587

Date	**Description**
Dec. 13, 2016	Appellant's Opening Brief
Dec. 19, 2016	Joint Appendix
Feb. 7, 2017	Brief for Defendants/Appellees
Feb. 21, 2017	Appellant's Reply Brief
Apr. 4, 2017	Clerk's Letter to Counsel instructing the parties to submit supplemental briefing on standing
Apr. 13, 2017	Supplemental Brief for Defendants/Appellees
Apr. 14, 2017	Appellant's Supplemental Brief
Apr. 18, 2017	Appellees' Summary of Oral Argument
Apr. 18, 2017	Appellant's Summary of Oral Argument
July 6, 2017	Opinion
July 6, 2017	Judgment
July 28, 2017	Mandate

Filed 10/21/2014

ROSE MARY KNICK Plaintiff v. SCOTT TOWNSHIP Defendant	IN THE COURT OF PLEAS OF LACKAWANNA COUNTY CIVIL DIVISION 13 CV 2309

ORDER

AND NOW, this 21st day of **October 2014**, upon consideration of Plaintiff's Motion for Injunctive Relief/Declaratory Judgment, the applicable law, and argument before this court on the matter, it is hereby ORDERED AND DECREED that this court will render no decision on the matter.

This court finds that it is not the proper venue for this matter, since this case is not in the proper posture for a decision to be rendered on the Plaintiff's requested forms of relief.

BY THE COURT:

s/ Braxton, S.J.
John Braxton

Cc. *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. Civ. P. 236 (a)(2) by mailing time-stamped copies to:*

Attorney for Plaintiff
Frank Bolock, Esq.
Bolock Law
212 Front Street
Clarks Summit, PA 18411

Attorney for Defendant
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Document 1 Filed 11/20/2014

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

ROSE MARY KNICK Plaintiff	CIVIL ACTION – LAW
vs.	JURY TRIAL DEMANDED
SCOTT TOWNSHIP and CARL S. FERRARO, Individually and in his Official Capacity as Scott Township Code Enforcement Officer, Defendants	NO.: [ELECTRONICALLY FILED]

COMPLAINT

AND NOW comes Plaintiff, Rose Mary Knick, by and through her attorney, Frank J. Bolock, Jr., Esquire, who files this Complaint against Defendants above-named as follows:

I. INTRODUCTION

1. Plaintiff, Rose Mary Knick, brings this action for monetary damages to address the deprivation of civil rights secured to her by 42 U.S.C. Section 1983. Specifically, she alleges that she was subjected to an unlawful search of her property on April 10, 2013 in violation of her rights under the Fourth Amendment to the United States Constitution. Additionally, Scott Township enacted "special legislation" in the form of Ordinance 12-12-20-001 in December of 2012. Plaintiff asserts that Scott Township Ordinance No.

12-12-20-001 violates the Constitution of the United States of America in that the Ordinance is unconstitutionally vague, creates a retroactive penal regulation regarding private property in violation of the prohibition against ex post facto laws, the Ordinance as applied to Plaintiff would result in the public taking of her property without compensation, it is further unconstitutional and unenforceable. The Defendants unlawful actions caused Plaintiff emotional distress and economic losses. She seeks economic damages, compensatory and punitive damages, and attorneys' fees and costs of this action.

II. JURISDICTION AND VENUE

2. Jurisdiction of this civil rights action is conferred by this Court by 28 U.S.C. Sections 1343 and 1331.

3. Venue herein proper under 28 U.S.C. Section 139(b) as the acts complained of herein all occurred within this judicial district.

III. PARTIES

4. Plaintiff, Rose Mary Knick, is a United States citizen residing at 49 Country Club Road, Scott Township, County of Lackawanna, Commonwealth of Pennsylvania 18433.

5. Defendant, Scott Township, is a political subdivision of the Commonwealth of Pennsylvania, organized and existing in accordance with the laws of Pennsylvania with a designation as a Township of the Second Class. Defendant, Scott Township's principal office is located at 1038 Montdale Road, Scott Township, County of Lackawanna, Commonwealth of Pennsylvania. Scott Township, as a Municipal entity,

is capable of being sued under 42 U.S.C. Section 1983, and is subject to the jurisdiction of this Court.

6. Defendant, Carl S. Ferraro, was at all times the Code Enforcement Officer of Scott Township and in his individual and official capacity was a policy maker for Scott Township.

7. Defendant, Carl S. Ferraro is a resident of Commonwealth of Pennsylvania and is being sued in his individual and official capacity.

IV. STATEMENT OF FACTS

8. Plaintiff, Rose Mary Knick, is the owner of the real estate located at 49 Country Club Road, Scott Township, County of Lackawanna, Commonwealth of Pennsylvania. The Knick property (hereinafter referred to as "the Premises") is comprised of two parcels intersected by Country Club Road. The Premises consists of approximately 90 acres. The Premises has been continuously owned and occupied by Rose Mary Knick and/or members of her family dating back from 1970 continuing up through the present time. The Premises has been utilized over the years as the primary residence for Rose Mary Knick and members of her family, as a cultivated farmland, grazing area for horses, cattle and other farm animals.

9. At all times relevant hereto the Premises has been posted at regular intervals, "No Trespassing." The Premises is bounded by stonewalls, fences and other boundary markers.

10. Plaintiff, Rose Mary Knick, a conscientious citizen, taxpayer advocate frequently attends meetings of the Scott Township Supervisors and regularly confronts the Scott Township Board of Supervisors and administrative officials with respect

to expenditure of funds, tax revenue issues and municipal decisions.

11. In September 2008, apparently, in response to a citizen inquiry regarding an alleged existence of an ancient burial ground on the Premises, The Scott Township Supervisors and Township Solicitor discussed the issue of the alleged burial ground at several public meetings.

12. In 2008 and early 2009 Plaintiff, Rose Mary Knick, individually and through her then Counsel, Attorney Robert Cecchini, made a Right-To-Know request of the Scott Township Supervisors as to the particulars regarding the suggestion that a burial ground was situate on her property. Rose Mary Knick, individually and through her Counsel, advised the Scott Township Supervisors that there was no designation in the chain of title regarding the Premises regarding the existence of a burial ground or cemetery on the Premises. Further, Plaintiff and her Counsel advised Scott Township that there was no physical evidence of the existence of a burial ground or cemetery on the Premises.

13. In response to Plaintiffs Right-To-Know request the Scott Township Supervisors provided Plaintiff, Rose Mary Knick, and her Counsel with some written statements of individuals indicating their belief that an ancient burial ground existed on the Premises.

14. In correspondence dated October 23, 2008, Plaintiff, Rose Mary Knick through her Attorney, Robert Cecchini, provided Scott Township through their Solicitor with correspondence confirming that in fact the Premises had no designated burial ground,

grave, grave yard or cemetery and further that his review of the chain of title and other documentation confirmed that there had never been any designation, registration or documentation establishing the existence of a cemetery, burial ground or grave yard on the Premises.

15. The Scott Township Board of Supervisors took no further action with regard to the issue of the cemetery, burial ground or grave yard on Plaintiffs Premises until October 2012 at which time the Scott Township Board of Supervisors enacted an Ordinance, specifically Ordinance #12-10-18-001. Subsequent to the enactment of the aforesaid Ordinance the Township Supervisors took no action to enforce said Ordinance with regard to the Premises of the Plaintiff.

16. In December of 2012 the Scott Township Board of Supervisors enacted an Ordinance, Ordinance 12-12-20-001 dealing with the issue of the operation and maintenance of cemeteries and burial places. The December 2012 Ordinance repealed the October 2012 Ordinance in its entirety.

17. On April 10, 2013, Defendant, Carl S. Ferraro, Scott Township Code Enforcement Officer, following a collective determination by the Township Supervisors, without benefit of permission or an Administrative warrant conducted an inspection of the Knick premises.

18. On April 11, 2013, Scott Township issued a Notice of Violation alleging that the Knick premises existed in violation of the Scott Township Ordinance 12-12-20-001.

19. On or about May 7, 2013, Plaintiff, Rose Mary Knick, filed a Complaint in the Court of Common Pleas of Lackawanna County seeking Declaratory and Injunctive Relief requesting that the Court: a) declare the Scott Township Ordinance 12-12-20-001 was unconstitutional, void, ineffective and without force; b) declare that Scott Township is precluded from enforcing said Ordinance against Plaintiff and decree and that the Notice of Violation dated April 11, 2013 is nullified; c) grant equitable relief in the form of a Special Injunction preliminarily following hearing and permanently thereafter to preclude and enjoin Scott Township from enforcing Ordinance 12-12-20-001; and, d) grant such other and appropriate relief including the award of attorneys fees.

20. The Plaintiff, Rose Mary Knick, through Counsel provided Defendant, Scott Township, with notice regarding the presentation of an Emergency Motion for Injunctive Relief on or about May 7, 2013 and Scott Township through their Solicitor stipulated and agreed to the entry of an Order which provided:

> "ORDER
>
> AND NOW, this 9th day of May, 2013, upon consideration of the Plaintiff's Emergency Motion for Injunctive Relief, Defendant Scott Township's agreement to withdraw its Notice of Violation dated April 11, 2013, and in accordance with a Stipulation of Counsel for the Parties it is Hereby Ordered that all proceedings by Defendant Scott Township to enforce Ordinance No. 12-12-20-001 against Plaintiff Rose Mary Knick are Stayed pending the resolution of the issues raised in the

> underlying Complaint seeking Declaratory and Injunctive Relief.
>
> S/Nealon J."

21. A Hearing regarding Plaintiff's Complaint for Declaratory Judgment was eventually conducted by the Court of Common Pleas of Lackawanna County on October 8, 2014. The Court of Common Pleas of Lackawanna County, the Honorable John Braxton, entered an Order as follows:

> "ORDER
>
> AND NOW, this 21st day of October 2014, upon consideration of Plaintiff's Motion for Injunctive Relief/Declaratory Judgment, the applicable law, and argument before this court on the matter, it is hereby ORDERED AND DECREED that this court will render no decision on the matter. This court finds that it is not the proper venue for this matter, since the case is not in the proper posture for a decision to be rendered on the Plaintiff's requested forms of relief."
>
> BY THE COURT:
>
> Braxton ,SJ.
> John Braxton"

22. On October 31, 2014, in violation of the Order of the Court of Common Pleas of Lackawanna County of May 9, 2013, Scott Township Supervisors and Scott Township Code Enforcement Officer Carl S. Ferraro issued a Notice of Violation alleging violation of Scott Ordinance 12-12-20-001.

V. CAUSES OF ACTION

COUNT I

CLAIM AGAINST DEFENDANT SCOTT TOWNSHIP FOR A VIOLATION OF PLAINTIFF'S FOURTH AMENDMENT RIGHTS UNDER 42 U.S.C. SECTION 1983

23. Plaintiff, Rose Mary Knick, incorporates by reference the allegations of paragraphs 1 through 22 as though fully set forth herein.

24. Upon information and belief, Defendants Scott Township and Scott Township Board of Supervisors maintain a policy, practice, custom or procedure that its Code Enforcement Officer may effectuate warrantless entry onto the private property of citizens within Scott Township.

25. Scott Township's policy, custom, practice or procedure was the direct cause of the Scott Township's Code Enforcement Officer's action on April 10, 2013 consisting of his warrantless entry onto the private property of the Plaintiff, and as such resulted in the violation of Plaintiff's rights under the Fourth Amendment of the United States Constitution subjecting it to liability under 42 U.S.C. Section 1983.

26. Plaintiff has suffered damages as a result of Defendant Scott Township's unlawful policy, custom, practice or procedure.

WHREREFORE, Plaintiff, Rose Mary Knick, respectfully requests that this Court enter a judgment in her favor:

(a) Awarding her economic damages;

(b) Awarding her compensatory damages;

(c) Awarding her attorneys' fees and costs of this action; and

(d) Granting such other relief as the Court deems necessary and appropriate.

COUNT II

CLAIM AGAINST DEFENDANT SCOTT TOWNSHIP FOR A VIOLATION OF PLAINTIFF'S FOURTH AMENDMENT RIGHTS UNDER 42 U.S.C. SECTION 1983 FOR FAILURE TO TRAIN

27. Plaintiff incorporates by reference the allegations of paragraphs 1 through 26 as though fully set forth herein.

28. Upon information and belief, prior to the events complained of herein, Defendant Scott Township failed to train its Code Official, or inadequately trained its Code Official, in the law with regard to the necessity for obtaining an Administrative warrant prior to conducting an inspection of private property under the circumstances presented herein. Furthermore, Defendant Scott Township failed to train, or inadequately trained, its Code Official with regard to the making of searches and inspection of private property. Defendant Scott Township also inadequately supervised or failed to discipline its Code Official for violation of individual Constitutionally protected rights.

29. Defendant Scott Township's failure to train its Code Official, and its inadequate training of its Code Official, and/or its inadequate supervision or discipline of its Code Official was the result of its

deliberate indifference to the Constitutional rights of the citizens of Scott Township, including Plaintiff.

30. Defendant Scott Township's failure to train its Code Official and/or its failure to properly supervise or discipline its Code Official was the direct cause of the Defendant Carl S. Ferraro, Scott Township Code Enforcement Officer actions on April 10, 2013, as complained of above, and as such, resulted in the violation of Plaintiff's rights under the Fourth Amendment of the United States Constitution subjecting it to liability under 42 U.S.C. Section 1983.

31. Plaintiff has suffered damages as a result of Defendant Scott Township's failure to train, inadequate training of, inadequate supervision of, or inadequate discipline of its Code Official.

WHEREFORE, Plaintiff, Rose Mary Knick, respectfully requests that this Court enter a judgment in her favor:

(a) Awarding her economic damages;

(b) Awarding her compensatory damages;

(c) Awarding her attorneys' fees and the costs of this action;

(d) Awarding her punitive damages; and

(e) Granting such other relief as the Court deems necessary and appropriate.

COUNT III

CLAIM AGAINST DEFENDANT CARL S. FERRARO IN HIS OFFICIAL AND INDIVIDUAL CAPACITY FOR VIOLATION OF PLAINTIFF'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS UNDER 42 U.S.C. SECTION 1983

32. Plaintiff incorporates by reference the allegations of paragraph 1 through 31 as though fully set forth herein.

33. Defendant Ferraro's entry onto Plaintiff's private property and his conducting of a search on April 10, 2013 was made without an Administrative warrant, without permission and without legal justification.

34. Defendant Ferraro's actions as complained of above were taken under color of state law.

35. Defendant Ferraro's action constituted violation of Plaintiff's rights under the Fourth and Fourteenth Amendments under the United States Constitution resulting in liability under 42 U.S.C. Section 1983.

36. Plaintiff suffered damages as a direct result of Defendant Ferraro's unlawful actions including emotional distress.

37. Defendant Ferraro's actions as complained of, were willful, malicious, and/or were made in reckless disregard of Plaintiff's civil rights and Plaintiff is entitled to receive punitive damages.

WHEREFORE, Plaintiff, Rose Mary Knick, respectfully requests that this Court enter a judgment in her favor:

(a) Awarding her economic damages;

(b) Awarding her compensatory damages;

(c) Awarding her punitive damages;

(d) Awarding her attorneys' fees and costs of this action; and

(e) Granting such other relief as the Court deems necessary and appropriate.

COUNT IV

CLAIM AGAINST DEFENDANT SCOTT TOWNSHIP FOR VIOLATION OF PLAINTIFF'S CONSTITUTIONALLY PROTECTED RIGHTS PURSUANT TO THE FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS, UNDER 42 U.S.C. SECTION 1983

38. Plaintiff incorporates by reference the allegations of paragraph 1 through 37 as though fully set forth herein.

39. Defendant, Scott Township enactment of "special legislation" in the form of Ordinance No. 12-12-20-001 is violative of the Plaintiff, Rose Mary Knick's Constitutionally protected rights pursuant to the Fourth, Fifth and Fourteenth Amendments. Said Ordinance is illegal, unconstitutional and without force of law in the following respects, among others:

a. The provisions of said Ordinance are vague, and;

b. The provisions of said Ordinance at Section 2 seeks to create a retroactive penal regulation regarding private property in violation of prohibition against ex post facto laws, and;

c. The provisions of said Ordinance are unreasonable and have no rationale relation to the promotion of public health and safety and exist as an improper exercise of the Township Police power, and;

d. The provisions of Section 5 of the Ordinance and Section 2 of the Ordinance attempt to impose regulations on private property which require that, "all cemeteries within the Township shall be kept open and accessible to the general public during day light hours. No owners or personnel shall unreasonably restrict access to the general public nor shall any fee for access be charged." These provisions exist as an effort at public taking without compensation, and;

e. The application of the Ordinance to Plaintiff's private property actually creates a nuisance by mandating public access to and across Plaintiff's private property which is otherwise not open to the public, and;

f. The Ordinance and Scott Township's effort at enforcement as substantial relationship to the promotion of public health and safety, and;

g. The provisions of Section 6 of the Ordinance attempt to grant to the Township rights to access private property which are violative of the Fourth Amendment of the United States Constitution.

40. The Plaintiff has suffered damages as a direct result of the enactment by Scott Township of Ordinance No. 12-12-20-001.

WHEREFORE, Plaintiff, Rose Mary Knick, respectfully requests that this Court enter a judgment in her favor:

(a) Awarding her economic damages;

(b) Awarding her compensatory damages;

(c) Awarding her punitive damages;

(d) Awarding her attorneys' fees and costs of this action; and

(e) Granting such other relief as the Court deems necessary and appropriate.

Respectfully submitted,

/s/ Frank J. Bolock, Jr., Esquire
Frank J. Bolock, Jr., Esquire
Atty. I.D. No. 29983
212 Front Street
Clarks Summit, PA 18411
Tel. (570) 585-5600
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Attorney for Plaintiff Rose Mary Knick

Document 8-1 Filed 2/3/2015
United States District Court
for the Middle District of Pennsylvania

SCOTT TOWNSHIP
LACKAWANNA COUNTY
ORDINANCE NO. 12-12-20-001

ORDINANCE OF THE TOWNSHIP OF SCOTT TOWNSHIP, LACKAWANNA COUNTY, PENNSYLVANIA, RELATING TO THE OPERATION AND MAINTENANCE OF CEMETERIES AND BURIAL PLACES.

WHEREAS, Scott Township is a Pennsylvania Township of the Second Class duly organized and existing under the laws of the Commonwealth of Pennsylvania; and

WHEREAS, the Second Class Township Code grants the Board of Supervisors of the Township to adopt Ordinances in which general or specific powers of the Township may be exercised in order to promote the health, safety and welfare of its residents; and

WHEREAS, 53 P.S. §66536 (a) (§1536) entitled "Cemeteries" authorizes the Board of Supervisors to make rules and regulations regarding the location, operation and maintenance of cemeteries within the Township by Ordinance; and

WHEREAS, the Board of Supervisors of Scott Township believes that regulating cemeteries within the Township serves in the best interest of the Township.

NOW, THEREFORE, the Board of Supervisors of the Township of Scott, Lackawanna County, Pennsylvania, hereby ENACTS and **ORDAINS** as follows:

1.) **Definitions** –

a. "Burial Place" – A portion of ground either occupied by a tomb or grave or set apart for a tomb or grave for burial of the dead.

b. "Code Enforcement Officer" – The person duly appointed as the official Code Enforcement Officer for Scott Township, Lackawanna County.

c. "Cemetery" – A place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings.

d. "Owner" – An individual(s), entity, group, association or organization who holds title to the land upon which any cemetery is located or who is otherwise vested with the authority to operate/maintain same.

e. "'Township" – Scott Township, Lackawanna County, Pennsylvania.

2.) **Applicability** – All cemeteries, whether private or public, and whether existing or established prior to the date of this Ordinance or hereafter created, are subject to the terms and conditions of this Ordinance.

3.) **Establishing Cemeteries** – It shall be unlawful for any person or owner to establish any cemetery or to bury any person within the Township, except within a cemetery duly established in accordance with all laws, regulations, ordinances and procedures.

4.) **Maintenance of Cemeteries** – It shall be the duty of every owner to properly maintain and upkeep any cemetery. No owner shall allow grass, weeds or trees to accumulate upon same to the extent that any grave marker is obstructed and shall otherwise keep same free of debris and refuse,

5.) **Open to Public** – All cemeteries within the Township shall be kept open and accessible to the general public during daylight hours. No owner or personal shall unreasonably restrict access to the general public nor shall any fee for access be charged.

6.) **Abandoned/Neglected Cemeteries** – When any cemetery or burial place is abandoned or is being neglected and not up-kept or maintained, the Code Enforcement Officer, on behalf of the Board of Supervisors, shall give written notice to the owner directing the removal of weeds, trees, refuse and/or other debris from the cemetery within thirty (30) days. If the removal is not completed within thirty (30) days after the written notice, the Township may enter upon the property and provide for the removal to be done by employees of the Township or persons hired for such purpose at the Township's expense. All costs of removal shall be assessed against the owner, if known, and thereafter shall be collected by the Township pursuant to 53 Y.S. §68302(b) of the Second Class Township Code. The Code Enforcement Officer and/or his/her agents and representatives may enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery, in order to ensure compliance with the terms and provisions of this Ordinance.

7.) **Violations/Penalties/Enforcement** – Any person or owner who violates or permits a violation of this Ordinance, upon being found liable therefore in a civil enforcement proceeding before a District Justice or Magisterial District Justice, shall pay a fine and/or penalty of not less than Three Hundred **($300.00)** Dollars nor more than Six Hundred **($600.00)** Dollars per violation, plus all court costs, including reasonable attorney's fees incurred by the Township in the enforcement of this Ordinance. Each day that the violation exists shall constitute a separate offense. In any case where penalty for a violation has not been timely paid, and the person against whom the penalty is imposed is found to have been liable therefore in civil proceedings, the violator shall be liable for the penalty imposed including additional reasonable attorney's fees incurred by the Township in any enforcement proceedings. If the violator neither pays nor timely appeals the judgment, once final, the Township may enforce the judgment pursuant to the applicable rules of civil procedure.

Nothing contained herein shall preclude the Township and/or Code Enforcement Officer from instituting any other appropriate civil or equitable proceeding to restrain, correct or abate a violation of this Ordinance as may be allowed for under any and all appropriate laws, statutes, Ordinances and/or regulations.

8.) **Other Laws, Ordinances, Codes or Regulations** – Nothing contained herein shall be deemed to nullify, replace, repeal or abrogate any other law, ordinance, rule, code or regulation regarding cemeteries and same shall be separately applicable and/or enforceable in accordance with their own terms.

9.) **Severability** – If any sentence, clause, section or part of this Ordinance is, for any reason, found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not effect or impair any of the remaining provisions, sentences, clauses or parts of this Ordinance and same shall remain in full force and effect.

10.) **Effective Date/Repealer** – This Ordinance shall become effective five (5) days from the date of its enactment. Upon the effective date of this Ordinance, Ordinance #12-10-18-001 is hereby repealed in its entirety.

This Ordinance is **DULY ENACTED AND ORDAINED** on this 20th day of December, 2012, at a duly advertised public meeting of the Board of Supervisors.

ATTEST:

s/ Thomas W. Wuks **Secretary**	s/ David Makala **Supervisor – Chairman**
	s/ Edward R. Hlavaty **Supervisor**
	______________________ **Supervisor**

Document 10-1 Filed 03/02/2015
United States District Court
for the Middle District of Pennsylvania

Filed 1/30/2015

ROSE MARY KNICK, Plaintiff vs. SCOTT TOWNSHIP, Defendant	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY CIVIL ACTION – AT LAW NO. 13 CV 2309

MEMORANDUM AND ORDER

NEALON,J.

After a Scott Township landowner, whose property reportedly contains aged burial grounds, received notice from the Township to remove foliage and debris from the grave markers and to provide public access to the cemetery in accordance with the Township's Ordinance regulating cemeteries, the landowner filed this declaratory judgment action seeking a declaration that the Ordinance is unconstitutional and unenforceable. On May 9, 2013, the parties agreed to a Consent Order staying the Township's enforcement of the Ordinance against the landowner pending an adjudication of the landowner's declaratory judgment claim. The parties later argued the declaratory judgment issues before another judge, at which time the Township asserted that the alleged unconstitutionality of the Ordinance could only be raised in a civil enforcement proceeding filed by the Township, rather than via the exercise of equitable jurisdiction to declare the Ordinance unconstitutional in advance of any such enforcement proceeding. Once the presiding judge held on October 21, 2014, that the common pleas court "is not the proper venue for this matter, since this case is not in the proper posture for a decision to be rendered on the [landowner's] requested forms of relief," the Township issued a new "Notice of Violation" to the landowner, who promptly filed the instant petition seeking to hold the Township and its Code Enforcement Officer in civil contempt for allegedly violating the stipulated stay Order of May 9, 2013, by issuing the violation notice.

To succeed with her contempt petition, the landowner must establish that the Township and its Code Enforcement Officer violated a clear and specific order volitionally and with wrongful intent. A fair reading of the ruling dated October 21, 2014, leads one to conclude that the presiding judge agreed with the Township and declined to assume equitable jurisdiction to entertain the landowner's constitutional challenge, finding instead that those constitutional issues should be addressed in any civil enforcement proceeding. Since the stay Order held the enforcement proceedings in abeyance only until the requested declaratory judgment relief was considered in this matter, it was reasonable for the Township to conclude that it was at liberty to enforce the cemetery Ordinance against the landowner following the ruling on October 21, 2014. Consequently, the landowner has not demonstrated by a preponderance of the evidence that the Township and the Code Enforcement Officer violated the prior stay Order with wrongful intent when they issued a new violation notice on October 31, 2014. As a result, the petition for civil contempt will be denied.

I. FACTUAL BACKGROUND

According to the parties' binding judicial admissions contained in their pleadings, Plaintiff, Rose Mary Knick ("Knick"), acquired 93.3 acres of land located in Scott Township in April 2008. (Docket Entry No. 1, Exhibit A; Docket Entry No. 11 at ¶ 3). At several public meetings in the fall of 2008, the Supervisors and Solicitor for Defendant, Scott Township ("the Township"), discussed the possible existence of a burial ground on Knick's property after being advised by Township residents that such a burial ground was present on that property. (Docket Entry No. 1 at ¶ 5; Docket Entry No. 6 at ¶ 5; Docket Entry No. 11 at ¶ 5). On October 23, 2008, Knick's former counsel forwarded a letter to the Township's Solicitor concerning the "Scott Township Board of Supervisors meetings of September 18, 2008, and October 16, 2008, wherein individuals indicated that they were looking for help to access a cemetery plot" on Knick's land. (Docket Entry No. 1 at ¶ 8, Exhibit B; Docket Entry No. 6 at ¶ 8; Docket Entry No. 11 at ¶ 6). Knick's ex-counsel requested documents "under the Right-to-Know Act that relate to the existence of a cemetery or burial ground on [Knick's] property," asserted that "[a]ny action by the Township should follow the procedures of the [Second Class] Township Code and the Pennsylvania Municipal Act under [53 P.S.] § 66536(a) regarding action by *ordinance* to make rules and regulations regarding the location, operation, and maintenance of cemeteries in the Township," and offered to have "any remains of servicemen that can be located on [Knick's] property

. . . properly removed and relocated" to another site.[1] (*Id.*, Exhibit B) (emphasis in original).

In October 2012, the Township Board of Supervisors enacted Ordinance No. 12-10-18-001 "Relating to the Operation and Maintenance of Cemeteries and Burial Places." (Docket Entry No. 1 at ¶ 9, Exhibit C; Docket Entry No. 6 at ¶ 9; Docket Entry No. 11 at ¶ 8). The Ordinance defines a "cemetery" as "a place or area of ground, whether contained on private or public property, which has been set apart or otherwise utilized as a burial place for deceased human beings," while a "burial place" is defined as "a portion of ground either occupied by a tomb or grave or set apart for a tomb or grave for burial of the dead." (*Id.*, Exhibit C at § 1(a), (c)). Section 4 of the Ordinance states that it is "the duty of every owner to properly maintain and upkeep any cemetery," and Section 5 authorizes the Township Code Enforcement Officer to deliver "written notice to the owner directing the removal of weeds, trees, refuse and/or other debris from the cemetery within thirty days." (*Id.* at §§ 4, 5). If the required maintenance "is not completed within thirty (30) days after the written notice, the Township may enter upon the property and provide for the removal to be done by employees of the Township or persons hired for such purpose at the Township's expense." (*Id.* at § 5). In addition to enabling the Township to recover the costs of any such maintenance from the owner, the Ordinance provides that "[a]ny person or owner who violates or permits a violation of this Ordinance, upon being found liable therefor in a civil enforcement proceeding before a District Justice or Magisterial District Judge, shall pay a fine and/or penalty of not less than Three Hundred ($300.00) Dollars nor more than One Thousand ($1,000.00) Dollars per violation, plus all court costs, including reasonable attorney's fees incurred by the Township in the enforcement of this Ordinance." (*Id.* at §§ 5-6).

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[1] Section 1536(a) of the Second Class Township Code, Act of May 1, 1933, P. L. 103, No. 69, *as amended*, Act of November 9, 1995, P. L. 350, No. 60, provides that "[t]he board of supervisors may by ordinance make rules and regulations regarding the location, operation and maintenance of cemeteries in the township." 53 P.S. § 66536(a).

On December 20, 2012, the Township repealed Ordinance No. 12-10-18-001 and enacted Ordinance No. 12-12-20-001 in its stead. (Docket Entry No. 1 at ¶ 11, Exhibit D; Docket Entry No. 6 at ¶ 11; Docket Entry No. 11 at ¶ 9). The current Ordinance is identical to the repealed Ordinance, with two exceptions. First, the more recent Ordinance contains a new section, which reads:

> **Open to Public** – All cemeteries within the Township shall be kept open and accessible to the general public during daylight hours. No owner or personal (*sic*) shall unreasonably restrict access to the general public nor shall any fee for access be charged.

(*Id.* at § 5).[2] Second, the maximum fines or penalties recoverable in a civil enforcement proceeding have been reduced to $600.00 in the present Ordinance. (*Id.* at § 7).

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[2] Section 1536(c) of the Second Class Township Code similarly states that "[t]he cemetery shall remain open to the public under the regulation and control of the board of supervisors." 53 P.S. § 66536(c).

On April 11, 2013, the Township's Code Enforcement Officer, Carl S. Ferraro, forwarded a "Notice of Violation" to Knick based upon his inspection of Knick's property on April 10, 2013, which reportedly revealed the presence of "[m]ultiple grave markers/tombstones" and led him to conclude "that a 'cemetery' as defined by Ordinance No. 12-12-20-001 exists on [her] property." (Docket Entry No. 1, Exhibit E at p. 1). Mr. Ferraro's notice cited the Ordinance requirement "that all cemeteries be maintained and kept up by the owner of the property" and remain "open and accessible to the general public during daylight hours." (*Id.*). Noting that the grave markers "were found to be obscured by trees, dirt and weeds" or "buried or covered with dirt and leaves," Mr. Ferraro directed Knick "to remove any weeds, trees or debris from the cemetery that may be obscuring the graves or markers" and "to make access to the cemetery available to the public during daylight hours." (*Id.* at pp. 1-2). Finally, the Code Enforcement Officer informed Knick that a "second inspection of the property" would be conducted in thirty-one days, that the Township would "enter upon the property" and perform the required maintenance if it was not completed by Knick within thirty days, and that Knick's failure to comply with the Ordinance would "result in a civil enforcement action being brought by the Township." (*Id.* at p. 2).

On May 7, 2013, Knick filed a "Complaint Seeking Declaratory Judgment and Injunctive Relief," seeking a declaration "that Scott Township Ordinance No. 12-12-20-001 is unconstitutional," "that Scott Township is precluded from enforcing said Ordinance against [Knick]," and that "the April 10, 2013 warrantless entry by Scott Township onto [Knick's] private property is violative of [Knick's] constitutionally guaranteed right against unreasonable search and seizure." (Docket Entry No. 1 at pp. 6-8). After Knick's counsel advised the Township's former Solicitor of Knick's intention to file an "Emergency Motion for Injunctive Relief," the parties entered into a stipulation which was to be memorialized in a Consent Order. (Docket Entry No. 12, Exhibit A). As part of this stipulation, "Scott Township agree[d] to withdraw the Notice of Violation issued by the Code Enforcement Officer dated April 11, 2013, in its entirety," and likewise "agree[d] not to proceed with any enforcement whatsoever of Ordinance No. 12-12-20-001 pending final determination of [Knick's] action for Declaratory Judgment." (*Id.*). As a result of the parties' stipulation, Knick's claims seeking injunctive relief became "moot," and the parties instead opted "to litigate the Declaratory Relief Action in accordance with standard procedure under [the Pennsylvania] Rules." (*Id.*).

Consequently, on May 9, 2013, the parties presented a Consent Order to the undersigned in his capacity as the assigned Motions Court Judge. (Docket Entry No. 12 at ¶¶ 5-6). On that date, an Order was issued based upon "Scott Township's Agreement to Withdraw its Notice of Violation dated April 11, 2013," and the accompanying "Stipulation of Counsel for the parties." (Docket Entry No. 2). By virtue of the parties' stipulation, it was "ordered that all proceedings by Defendant Scott Township to enforce Ordinance No. 12-12-20-001 against Plaintiff Rose Mary Knick are stayed pending the resolution of the issues raised in the underlying Complaint seeking Declaratory and Injunctive Relief." (*Id.*).

Fifteen months later, Knick filed a "Praecipe for Assignment" with the Court Administrator on August 14, 2014, attesting that Knick had "filed a Complaint Seeking Declaratory Judgment" and that "[t]he parties through counsel intend to agree upon a set of stipulated facts that will require a briefing schedule and the scheduling of oral argument."[3] (Docket Entry No. 4). By notice dated August 18, 2014, the Court Administrator advised the parties that Visiting Senior "Judge John Braxton will hear oral argument on the Plaintiff Rose Mary Knick Declaratory Judgment on October 8, 2014," and established deadlines for the filing of the parties' briefs. (Docket Entry No. 5). In the interim, the parties executed and submitted a "Stipulation of Facts" in conjunction with that scheduled oral argument. (Docket Entry No. 11).

In advance of the oral argument, Knick filed a brief which argued that Ordinance No. 12-12-20-001 should be declared "as unconstitutional, void, ineffective and without force" and that the Township should, therefore, be permanently enjoined from seeking to enforce that Ordinance. (Docket Entry No. 7 at pp. 4-8). Citing *Pennsylvania Soc. for Prevention of Cruelty to Animals v. Bravo Enterprises.*

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[3] Under Local Rule 211(a), a party seeking the assignment of "a motion or petition to a judge for disposition" must file a "Praecipe for Assignment" with the Clerk of Judicial Records and the Court Administrator. Lacka. Co. R.C.P. 211(a). The Praecipe for Assignment form requires the moving party to identify the motion, petition or pleading that is being submitted for a decision. *Id.*, Form 2. On her Praecipe for Assignment, Knick listed the "Complaint Seeking Declaratory Judgment" as the filing to be assigned to a judge for disposition. (Docket Entry No. 4).

Inc., 428 Pa. 350, 356-357, 237 A.2d 342, 346 (1968), the Township countered that a person facing potential prosecution is barred from having a court exercise equity jurisdiction to "adjudicate his guilt or innocence via a suit to enjoin his prosecution," and asserted that the proper forum for Knick's constitutional challenge to Ordinance No. 12-12-20-001 is in connection with any civil enforcement proceeding that may be instituted pursuant to the Ordinance. (Docket Entry No. 10 at pp. 2-3). The Township acknowledged an exception to this rule whereby a court may exercise equitable jurisdiction to protect property rights if an ordinance is unconstitutional and its enforcement will cause irreparable harm to the plaintiff's property, but maintained "that Knick cannot establish the basis for such equitable jurisdiction" since "[t]he circumstances of this case do not reflect any irreparable harm to Knick." (*Id.* at p. 3). Following the oral argument on October 8, 2014, Senior Judge Braxton issued an Order on October 21, 2014, which read:

> AND NOW, this 21st day of October, 2014, upon consideration of Plaintiff's Motion for Injunctive Relief/Declaratory Judgment, the applicable law, and argument before this court on the matter, it is hereby ORDERED and DECREED that this court will render no decision on the matter.
>
> This court finds that it is not the proper venue for this matter, since this case is not in the proper posture for a decision to be rendered on the Plaintiff's requested forms of relief.

(Docket Entry No. 9). Neither party filed an appeal from Judge Braxton's Order of October 21, 2014.

Upon receipt of Judge Braxton's Order, the Township Code Enforcement Officer, Mr. Ferraro, discussed it with the Township's Solicitor who advised Mr. Ferraro that the earlier stay Order dated May 9, 2013, was no longer in effect following Judge Braxton's ruling. On October 31, 2014, Mr. Ferraro forwarded another "Notice of Violation" to Knick. (Docket Entry No. 12, Exhibit D). Mr. Ferraro advised Knick that "[b]ased on information received from eyewitness accounts, it has been determined that a 'cemetery' as defined by Ordinance No. 12-12-20-001 exists on your property." (*Id.* at p. 1). Using language identical to the original "Notice of Violation" dated April 11, 2013, Mr. Ferraro informed Knick of the maintenance and public access requirements of the Ordinance, directed her to comply with those requirements within thirty days, stated that another inspection would be conducted in thirty-one days, and cautioned her about the prospect of "a civil enforcement action being brought by the Township" if she failed to comply with those requirements. (*Id.* at pp. 1-2).

In reply, Knick filed a complaint against Ferraro and the Township in federal court on November 20, 2014, seeking compensatory and punitive damages for alleged civil rights violations under 42 U.S. § 1983. *See Knick v. Scott Township et al*, No. 3:14 CV 2223 (M.D. Pa.). Six days later, Knick filed a "Petition for Contempt/Enforcement of Order Granting Injunctive Relief" in this state court action, and requested that Mr. Ferraro and the Township be held in contempt of the Order of May 9, 2013, for issuing a "Notice of

Violation" to Knick on October 31, 2014. (Docket Entry No. 12). On November 26, 2014, Judge Vito P. Geroulo issued a Rule upon Mr. Ferraro and the Township to show cause why they should not be held in contempt, and scheduled a hearing on the contempt petition for January 26, 2015. (*Id.* at p. 1). Judge Geroulo further ruled that "[a]ll proceedings regarding Scott Township's efforts to enforce Ordinance No. 12-12-20-001 are stayed pending disposition of this rule." (*Id.*).

Knick contends that "on October 8, 2014, the parties briefed, provided the judge with a stipulation of facts, and argued their respective positions with respect to the issue of the constitutionality of Ordinance No. 12-12-20-001," but that "[t]he October 21, 2014, Order by Judge John Braxton was a 'non decision' that did not dissolve or amend the May 9, 2013, Order of Court and did not result in the resolution of the matters raised" in the Complaint. (Docket Entry No. 15 at p. 4). Based upon that reasoning, Knick alleges that "[t]he October 31, 2014, Notice of Violation issued by the Scott Township Enforcement Officer was in direct violation of the May 9, 2013 Order of Court," such that the Township and Mr. Ferraro should be found in contempt. (*Id.* at pp. 4-5). The Township posits that since it consistently argued that "the unconstitutionality of the Ordinance must be raised in the summary enforcement proceedings themselves," its Code Enforcement Officer concluded, following consultation with its Solicitor, that Judge Braxton's Order of October 21, 2014, constituted a "resolution of the issues raised in the underlying Complaint," as a result of which the stay Order of May 9, 2013, "was no longer in effect." (Docket Entry No. 14 at pp. 3-4). Following the completion of oral argument on January 26, 2015, Knick' s contempt petition became ripe for disposition.

II. DISCUSSION

(A) CONTEMPT BURDEN OF PROOF

"Contempt is a generic concept distinguished by two types, criminal and civil contempt," with each classification "serv[ing] a different purpose for regulating obstruction" of orderly process. *Warmkessel v. Heffner*, 17 A.3d 408, 414 (Pa. Super. 2011), *app. denied*, 613 Pa. 671, 34 A.3d 833 (2011). If the dominant purpose is to vindicate the authority of the court and to protect the interest of the general public by punishing the contemnor for a past violation, it is a proceeding for criminal contempt. *Gunther v. Bolus*, 853 A.2d 1014, 1 016 (Pa. Super. 2004), *app. denied*, 578 Pa. 709, 853 A.2d 362 (2004). "But where the act of contempt complained of is the refusal to do or refrain from doing some act ordered or prohibited primarily for the benefit of some private party, proceedings to enforce compliance with the decree of the court are civil in nature." *Warmkessel, supra* (quoting *Stahl v. Redcay*, 897 A.2d 478, 486 (Pa. Super. 2006), *app. denied*, 591 Pa. 704, 918 A.2d 747 (2007)). At the time of oral argument, Knick confirmed that her petition only seeks to hold Mr. Ferraro and the Township in civil contempt.

In civil contempt proceedings, "[j]udicial sanctions are employed to coerce the defendant into compliance with the court's order, and in some instances, to compensate the complainant for losses sustained." *In re Contempt of Attorney Christopher P. Cullen*, 949 A.2d 1207, 1210 (Pa. Super. 2004), *app. denied*, 582 Pa. 676, 868 A.2d 1201 (2005). The burden of proof rests with the complaining party to demonstrate that the defendant is in noncompliance with a court order. *MacDougall v. MacDougall*, 49 A.3d 890, 892 (Pa. Super. 2012), *app. denied*, 621 Pa. 679, 75 A.3d 1282 (2013). "However, a mere showing of noncompliance with a court order, or even misconduct, is never sufficient alone to prove civil contempt." *In re Contempt of Cullen, supra* (quoting *Lachat v. Hinchcliffe*, 769 A.2d 481, 488 (Pa. Super. 2001)).

To sustain a finding of civil contempt, the complainant must prove by a preponderance of the evidence that: (1) the contemnor had notice of the specific order or decree which [s]he is alleged to have disobeyed; (2) the act constituting the contemnor's violation was volitional; and (3) the contemnor acted with wrongful intent. *Habjan v. Habjan*, 73 A.3d 630, 637 (Pa. Super. 2013); *In re Contempt of Cullen*, 849 A.2d at 1210-1211. "Wrongful intent" on the part of the contemnor "requires evidence that the contemnor knows or should reasonably be aware that his [/her] conduct is wrongful." *Com. v. Odom*, 764 A.2d 53, 56 (Pa. Super. 2000). Furthermore, "[t]o be punished for contempt, a party must not only have violated a court order, but that order must have been 'definite, clear and specific—leaving no doubt or uncertainty in the mind of the contemnor of the prohibited conduct.'" *Stahl*, 897 A.2d at 489 (quoting *In re Contempt of Cullen*, 849 A.2d at 1210); *Com., Department of Environmental Protection v. Finch Hill Water Company, Inc.*, 2011 WL 2262480, at *2 (Lacka. Co. 2011). "Because the order forming the basis for civil contempt must be strictly construed, any ambiguities or omissions in the order must be construed in favor of the defendant." *Bold v. Bold*, 939 A.2d 892, 897 (Pa. Super. 2007); *In re Contempt of Cullen, supra*;

Moskwa v. Pilosi, 2011 WL 1560034, at *3 (Lacka. Co. 2011).

(B) STIPULATED STAY ORDER

To secure her requested contempt relief, Knick must demonstrate by a preponderance of the evidence that Mr. Ferraro and the Township violated a "definite, clear and specific" order, and did so with "wrongful intent" in that they knew, or reasonably should have known, that their actions were violative of the order. Stated another way, Knick must prove that (1) the issuance of a "Notice of Violation" on October 31, 2014, violated the parties' stipulated stay Order of May 9, 2013, and (2) Mr. Ferraro and the Township knew or should have known that the issuance of the "Notice of Violation" to Knick was in contravention of the earlier stay Order.

The parties' submissions reflect that on May 9, 2013, the Township agreed to withdraw its original "Notice of Violation" dated April 11, 2013, and to stay "all proceedings by Defendant Scott Township to enforce Ordinance No. 12-12-20-001 against Plaintiff Rose Mary Knick" pending the disposition of the declaratory judgment claim asserted by Knick. (Docket Entry No. 2 at p. 1). The Township solicitor's letter of May 8, 2013, clearly states that the "Stipulated Order" would memorialize the Township's agreement "not to proceed with any enforcement whatsoever of Ordinance No. 12-12-20-001 pending final determination of [Knick's] action for Declaratory Judgment." (Docket Entry No. 12, Exhibit A). The only declaratory judgment relief sought by Knick in her complaint was a declaration that Ordinance No. 12-12-20-001 is unconstitutional. (Docket Entry No. 1 at ¶¶ 15-27). The solicitor's correspondence dated May 8, 2013, documents the Township's understanding that as a result of the parties' stipulation, Knick's claims "regarding Injunctive Relief' were rendered moot. (Docket Entry No. 12, Exhibit A). Thus, construing any ambiguities in the stipulated stay Order in favor of the Township, the consent Order that was prepared by counsel and executed on May 9, 2013, merely stayed enforcement of the Ordinance against Knick until a ruling was made on Knick's constitutional challenge to the Ordinance in this case.

More than one year after the entry of the stay Order, Knick filed a "Praecipe for Assignment" to have her "Complaint Seeking Declaratory Judgment" assigned to a judge for disposition based "upon a set of stipulated facts" to be submitted by the parties. (Docket Entry No. 4). Knick' s brief in connection with that scheduled proceeding argued that Ordinance No. 12-12-20-001 should be declared "unconstitutional, void, ineffective and without force," whereas the Township maintained that Knick's constitutional attack should be addressed in any civil enforcement proceeding that may be filed by the Township, since Knick had not established the requisite constitutional infirmity and irreparable harm to invoke the common pleas court's equitable jurisdiction. (Docket Entry No. 7 at pp. 4-8; Docket Entry No. 10 at pp. 2-3). Although Judge Braxton's postargument Order does indicate "that this court will render no decision on the matter," it further states that "[t]his court finds that it is not the proper venue for this matter since this case is not in the proper posture for a decision to be rendered on [Knick's] requested form of relief." (Docket Entry No. 9).

A reasonable interpretation of Judge Braxton's Order of October 21, 2014, is that he agreed with the Township's argument predicated upon *Bravo Enterprises*, and concluded that Knick's constitutional challenge to the Ordinance should be litigated in any civil enforcement proceeding that may be filed by the Township pursuant to Section 7 of the Ordinance.[4] Under such a plausible construction, Judge Braxton addressed the remaining "issues raised in the underlying Complaint" and concluded that Knick's request to have the Ordinance declared unconstitutional should be reserved for any civil enforcement action that may be filed by the Township. In that event, the stipulated stay "pending the resolution of the issues raised in the underlying Complaint" was no longer in effect. Thus, Knick has not demonstrated by a preponderance of the evidence that the actions of Mr. Ferraro and the Township in issuing a new "Notice of Violation" constituted noncompliance with "definite, clear and specific" language in the consent Order of May 9, 2013.

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[4] To exercise the equitable jurisdiction that was advocated by Knick under *Bravo Enterprises*, Judge Braxton would have been required to conclude (1) that Ordinance No. 12-12-20-001 was unconstitutional, and (2) that its enforcement would cause irreparable harm to Knick's property. *See Bravo Enterprises*, 428 Pa. at 356-357, 237 A.2d at 346; *Marcus v . Diulus*, 242 Pa. Super. 151, 159, 363 A.2d 1205, 1209 (1976). Harm "is deemed irreparable if it cannot be adequately compensated by an award of damages," *Cosner v. United Penn Bank*, 358 Pa. Super. 484, 492, 517 A.2d 1337, 1341 (1986), or if the damage "can be estimated only by conjecture and not by an accurate pecuniary standard." *Ambrogi v. Reber*, 932 A.2d 969, 978 n.5 (Pa. Super. 2007), *app. denied*, 597 Pa. 725, 952 A.2d 673 (2008); *Czarkowski v. Jennings*, 2013 WL 6074077, at *5 (Lacka. Co. 2013). By filing a federal lawsuit seeking to recover compensatory and punitive damages as a result of the Township's enforcement of the Ordinance, Knick has tacitly recognized that her alleged harm can be compensated by an award of damages and, therefore, is not "irreparable."

Nor has Knick established that Mr. Ferraro and the Township acted with "wrongful intent" by issuing the 2014 "Notice of Violation." Following consultation with the Township solicitor, Mr. Ferraro and the Township concluded that the stay Order was no longer in effect following Judge Braxton's ruling of October 21, 2014. The record is devoid of any suggestion that Mr. Ferraro and the Township knew, or reasonably should have known, that they were ostensibly violating the stay Order by issuing a new "Notice of Violation." In short, Knick has not satisfied her burden of proving a violation of the stay Order by Mr. Ferraro and the Township with wrongful intent, and as such, her petition for civil contempt will be denied.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROSE MARY KNICK, Plaintiff, v. **SCOTT TOWNSHIP, et al.,** Defendants.	CIVIL ACTION NO. 3:14-CV-2223 (JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is a Motion to Dismiss Plaintiff's Amended Complaint (Doc. 10.) filed by Defendants Scott Township and Carl Ferraro ("Ferraro"), individually and in his official capacity as Code Enforcement Officer of Scott Township. According to Plaintiff, Ms. Rose Mary Knick ("Ms. Knick"), Scott Township and Ferraro violated her constitutional rights through enactment and enforcement of a township ordinance addressing the operation and maintenance of cemeteries and burial grounds within Scott Township. As such, Plaintiff commenced this action asserting four (4) claims under 42 U.S.C. § 1983 and one (1) claim for relief pursuant to the Declaratory Judgment Act, seeking both declarative and injunctive relief. Defendants seek dismissal of the Amended Complaint in its entirety under Federal Rule of Civil Procedure 12(b)(6). Because Plaintiff has failed to adequately state claims for violations of her constitutional rights under § 1983, the motion to dismiss Counts I through IV shall be granted. Because Ms. Knick's request for a declaratory judgment would serve no purpose in the current action, the motion to dismiss Count V will be granted.

I. Background

The facts as alleged in the Amended Complaint (Doc. 9.) are as follows:

Rose Mary Knick is a resident of Scott Township, Pennsylvania. (*Am. Compl.*, ¶ 5.) Scott Township is a political subdivision of the Commonwealth of Pennsylvania, organized and designated as a Township of the Second Class. (*Id.* at ¶ 6.) Carl Ferraro was the Code Enforcement Officer of Scott Township and a resident of the Commonwealth of Pennsylvania. (*Id.* at ¶¶ 7-8.)

Ms. Knick owns approximately 90 acres of real estate, comprised of two parcels, located at 49 Country Club Road, in Scott Township, Pennsylvania. (*Id.* at ¶ 9.) The property has been continuously owned and occupied by Ms. Knick and her family members since 1970. (*Id.*) The property has been used as a primary residence, as well as farmland and grazing areas for horses, cattle and other farm animals. (*Id.*) There are "No Trespassing" signs placed at regular intervals and the property is bounded by stonewalls, fences and other boundary markers. (*Id.* at ¶ 10.)

Ms. Knick frequently attends meetings of the Scott Township Board of Supervisors ("Supervisors") and regularly confronts the Supervisors and administrative officials with respect to the expenditure of funds, tax revenue issues, and municipal decisions. (*Id.* at ¶ 11.)

In September 2008, at several public meetings and in response to a citizen inquiry, the Supervisors and the Township Solicitor discussed the alleged existence of an ancient burial ground on Ms. Knick's property. (*Id.* at ¶ 12.) In 2008 and early 2009, Ms. Knick, as well as her counsel at the time, made a Right-to-Know request of the Supervisors. (*Id.* at ¶ 13.) The request sought particulars regarding the suggestion that an ancient burial ground was on her property. (*Id.*) Ms. Knick and her counsel also advised the Supervisors that there was no designation in the chain of title to her property regarding a burial ground or cemetery and also that there was no physical evidence of the existence of a burial ground or cemetery. (*Id.*) Ms. Knick's attorney provided Scott Township, through their solicitor, a correspondence dated October 23, 2008, reiterating that there was no designation of a burial ground or cemetery in the chain of title nor any evidence of such on Ms. Knick's property. (*Id.* at ¶ 14.)

From October 2008 through October 2012, Ms. Knick continued to attend Supervisor meetings and regularly confronted the Supervisors and administrative officials about the expenditure of funds, tax revenue issues, and various municipal decisions. (*Id.* at ¶ 15.) The Supervisors and administrative officials, including Ferraro, expressed their annoyance, aggravation, and displeasure, both publicly and privately, regarding Ms. Knick's exercise of her First Amendment Rights. (*Id.*)

In December 2012, the Supervisors enacted an ordinance, specifically Ordinance 12-12-20-001 ("Ordinance"). (*Id.* at ¶ 16.) The Ordinance addresses the operation and maintenance of cemeteries and burial grounds within Scott Township. (*Id.*) There were no complaints at the time with regard to any cemeteries in Scott Township. (*Id.*) The Supervisors determined the Ordinance would be applied to Ms. Knick and her property. (*Id.*)

On April 10, 2013, after a collective determination by the Supervisors, Ferraro entered on to Ms. Knick's property without permission and without an administrative warrant. (*Id.* at ¶ 18.) On April 11, 2013, Scott Township issued a Notice of Violation alleging that Ms. Knick's property existed in violation of the Ordinance. (*Id.* at ¶ 19.)

On May 7, 2013, Ms. Knick filed a complaint in the Lackawanna County Court of Common Pleas seeking declaratory and injunctive relief and requested that the court take the following actions: declare the Ordinance unconstitutional, void, ineffective and without force of law; declare that Scott Township is precluded from enforcing the Ordinance against Ms. Knick and decree the Notice of Violation nullified; grant equitable relief in the form of a Special Injunction preliminarily following a hearing, and permanently thereafter to preclude and enjoin Scott Township from enforcing the Ordinance; and grant other and appropriate relief, including awarding attorney's fees. (*Id.* at ¶ 20.) Ms. Knick, through counsel, provided Scott Township with notice regarding the presentation of an Emergency Motion for Injunctive Relief on or about May 7, 2013. (*Id.* at ¶ 21.) In response, the parties agreed and stipulated to an order as follows:

> ORDER
>
> AND NOW, this 9th day of May, 2013, upon consideration of the Plaintiff's Emergency Motion for Injunctive Relief, Defendant Scott Township's agreement to withdraw its Notice of Violation dated April 11, 2013, and in accordance with a Stipulation of Counsel for the Parties, it is Hereby Ordered that all proceedings by Defendant Scott Township to enforce Ordinance No. 12-12-20-001 against Plaintiff Rose Mary Knick are stayed pending the resolution of the issues raised in the underlying Complaint seeking Declaratory and Injunctive Relief.
>
> /s/ Nealon, J.

(*Id.*) A hearing was held on October 8, 2014 in the Lackawanna County Court. (*Id.* at ¶ 22.) Following the hearing, Judge John Braxton issued the following Order:

> ORDER
>
> AND NOW, this 21st day of October 2014, upon consideration of the Plaintiff's Motion for Injunctive Relief/Declaratory Judgment, the applicable law, and argument before this court on the matter, it is hereby ORDERED AND DECREED that this court will render no decision on the matter.
>
> This court finds that it is not the proper venue for this matter, since the case is not in the proper posture for a decision to be rendered on the Plaintiff's requested forms of relief.

BY THE COURT:

Braxton , S.J.
John Braxton

(*Id.*) On October 31, 2014, the Supervisors and Ferraro issued another Notice of Violation alleging Ms. Knick's noncompliance with the Ordinance. (*Id.* at ¶ 23.) Ms. Knick filed a Petition for Contempt of Court in the Lackawanna County Court of Common Pleas. (*Id.* at ¶ 24.) After a hearing, Judge Terrance Nealon denied the Petition for Contempt and entered a Memorandum and Order. (*Id.*) The Lackawanna County Court of Common Pleas has not addressed Ms. Knick's request for Declaratory Relief. (*Id.*)

Ms. Knick initiated this action on November 20, 2014. (Doc. 1.) In the original complaint, Ms. Knick alleged violations, under 42 U.S.C. § 1983, of her Fourth Amendment rights against Scott Township, both for maintaining a policy, practice, custom or procedure and for failing to or for inadequately training, or failing to adequately supervise or discipline the Code Official. (Counts One and Two) She also alleged violations of her Fourth and Fourteenth Amendment rights by Ferraro in his official and individual capacity under 42 U.S.C. § 1983. (Count Three) Ms. Knick alleged violations of her First, Fourth, Fifth, and Fourteenth Amendment rights under 42 U.S.C. § 1983 through Scott Township's enactment of the Ordinance (Count Four). Defendants Scott Township and Ferraro filed a motion to dismiss. (Doc. 8.) Subsequently, Plaintiff filed an Amended Complaint asserting the four causes of action above with an additional claim. (Doc. 9.) Ms. Knick additionally requests relief pursuant to the Declaratory Judgment Act (Count Five). Ms. Knick requests a declaratory judgment deeming the Ordinance unconstitutional. She also seeks a Temporary Restraining Order and Preliminary and Permanent Injunctive relief. On March 2, 2015, Defendants filed a motion to dismiss the Amended Complaint. (Doc. 10.) On March 20, 2015, Ms. Knick filed a motion for an order for dismissal of Defendants' motion to dismiss for failure to file a brief in support within twenty (20) days. (Doc. 11.) On March 20, 2015, Defendants filed a motion for leave to file a reply brief *nunc pro tunc*. (Doc. 12.) An order was issued granting leave to file *nunc pro tunc*. (Doc. 13.) Defendants filed a brief in support of their motion to dismiss on March 31, 2015. (Doc. 14.) Ms. Knick filed a brief in opposition on April 14, 2015. (Doc. 15.) Defendants filed a reply brief on April 28, 2015. (Doc. 16.) The motion has been briefed and is ripe for review.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion, the Court's role is limited to determining if a plaintiff is entitled to offer evidence in support of their claims. *See Semerenko v. Cendant Corp.*, 223 F.3d 165, 173 (3d Cir. 2000). The Court does not consider whether a plaintiff will ultimately prevail. *See id.* A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. *See Gould Elecs. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000).

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R.

Civ. P. 8(a)(2). The statement required by Rule 8(a)(2) must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Detailed factual allegations are not required. *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. However, mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Instead, a complaint must "show" this entitlement by alleging sufficient facts. *Id.* "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). As such, "[t]he touchstone of the pleading standard is plausibility." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012).

The inquiry at the motion to dismiss stage is "normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, 127 S. Ct. 1955, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of" each necessary element. *Phillips v. Cty of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679, 129 S. Ct. 1937.

In deciding a motion to dismiss, the Court should consider the complaint, exhibits attached to the complaint, and matters of public record. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (citing *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Pension Benefit Guar.*, 998 F.2d at 1196. The Court need not assume the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998), or credit a complaint's "'bald assertions'" or "'legal conclusions.'" *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997)).

III. Discussion

Defendants seek to dismiss Ms. Knick's Amended Complaint in its entirety for failure to state a claim upon which relief can be granted. The Court will address the sufficiency of each count of Ms. Knick's Amended Complaint below.

A. Stay/Dismissal

Preliminarily, Defendants ask that I consider dismissal or a stay of the current action pending the outcome of the Ms. Knick's ongoing suit filed in the Lackawanna County Court of Common Pleas (Doc. 10 at ¶ 53; Doc. 14, 3-4.), asserting that Ms. Knick is "estopped from pursuing this matter since she is currently litigating a previously filed state court action." (Doc. 10 at ¶ 53.) It is settled that this Court's ability to stay an action is "incidental" to the Court's "inherent power," *Landis v. North Am. Co.*, 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936), and that motions seeking a stay are addressed in the court's discretion. *Bechtel v. Local 215 Laborers' Int'l Union*, 544 F.2d 1207, 1215 (3d Cir. 1976). In *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 496, 62 S. Ct. 1173, 1176, 86 L. Ed. 1620 (1942), the Supreme Court addressed the scenario where a request for a federal declaratory judgment was filed while an action was pending in state court presenting the same issues and involving the same parties. The Court set forth that the district court should consider the following when determining whether to exercise jurisdiction:

> Where a district court is presented with a claim such as was made here[1], it should ascertain whether the questions in controversy between the parties to the

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[1] The request for Declaratory Judgment in *Brillhart* was from an insurance company, requesting a determination of rights under a reinsurance agreement. *Id.* at 492, 1174 (remanding the case to the district court to conduct the discretionary inquiry the Court set forth).

> federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

Brillhart, 316 U.S. at 495, 62 S. Ct. at 1176. The resulting standard from *Brillhart* was a discretionary standard. Following *Brillhart*, the Supreme Court decided, among other cases, *Colorado River Water Conservation Dist. v. United States*, 316 U.S. 491, 62 S. Ct. 1173, 96 S. Ct. 1236 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Contr. Corp.*, 460 U.S. 1, 103 S. Ct. 9927, 74 L.Ed.2d 765 (1983). Both cases set forth that a court should decline to exercise jurisdiction only where exceptional circumstances are present, articulating a non-exhaustive list of factors for consideration. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 283-87, 115 S. Ct. 2137, 2141-42, 132 L.Ed.ed 214 (1995) (citing same). The Court later sought to reconcile the prior cases and set forth in *Wilton*, that "[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." 515 U.S. at 288, 115 S. Ct. at 2143. However, the Court did not "attempt . . . to delineate the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law or cases in which there are no parallel state proceedings." *Id.* at 290, 2144. Following ***Wilton***, the circuits have taken several different approaches. The Second Circuit has stated that ***Wilton*** set forth that abstention would be appropriate "where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties," and "the questions in controversy . . . can better be settled in the proceeding pending in the state court." *Niagara Mohawk Power Corp. v. Hudson River Black River Regulating Dist.*, 673 F.3d 84, 105-06 (2d Cir. 2012) (citing ***Wilton***, 515 U.S. at 282, 115 S.Ct. 2137 (internal quotation marks omitted) (applying abstention criteria and finding abstention was improper because a judgment by the district court would settle the legal issues between the parties and finalize the controversy). However, the Third Circuit has not definitively resolved the issue when an action involves claims requesting compensatory, economic and punitive remedies as well as injunctive and equitable relief. This Court previously addressed a request for declaratory judgment in an insurance coverage case where injunctive relief was additionally requested and no federal issue was implicated. *Hartford Ins. Co. Of the Southeast v. John J.*, 848 F. Supp. 2d 506 (M.D.Pa 2012). I declined to exercise jurisdiction but adopted the "heart of the matter approach." *Id.* at 513. Using the "heart of the matter approach", "a court will look to whether the nucleus of an action is declaratory or coercive[2], and will exercise jurisdiction over the whole if the core is coercive, and will exercise discretion as to both claims if it is declaratory." *Id.* at 511; *See Rarick v. Federated Service Insurance Company*, — F. Supp. 3d —, 2015 WL 5677295 *4 (E.D. Pa. September 28, 2015) (applying the "heart of the matter" approach when both declaratory and coercive claims were involved).

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[2] "Coercive" claims refer to those "seeking compensatory damages or injunctive relief." *Hartford Ins. Co.*, 848 F. Supp. at 511 n.1 (citing *Perelman v. Perelman*, 688 F.Supp.2d 367, 372 (E.D.Pa.2010).

In *Reifer v. Westport Ins. Corp.*, 751 D. 3d 129 (3d Cir. 2014), the Third Circuit set forth a two-part test for consideration when faced with a declaratory judgement request. First, a determination is to made whether there is are pending state court proceedings, *Id.* at 144, stating "the existence or non-existence of pending parallel state proceedings is but one factor for a district court to consider." *Id.* The second step involves exploring the following factors:

1. the likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the controversy;
2. the convenience of the parties;
3. the public interest in settlement of the uncertainty of obligation;
4. the availability and relative convenience of other remedies;
5. a general policy of restraint when the same issues are pending in a state court;
6. avoidance of duplicative litigation;
7. prevention of the use of the declaratory action as a method of procedural fencing or as a means to provide another forum in a race for res judicata; and

8. (in the insurance context), an inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion.

Id. at 146. *See Nationwide Agribusiness Inc. Co. v. Sheriff*, 2015 WL 365679 (M.D. January 27, 2015) (applying the *Reifer* factors). The *Reifer* court stated that the list was non-exhaustive and "other relevant case law or considerations could be considered." *Reifer*, 751 D. 3d at 146. Guided by the above, Defendants' argument that the current action should be stayed pending the Lackawanna County Court of Common Pleas case will be addressed.

In her Amended Complaint, Ms. Knick has requested relief in the form of economic, compensatory, and punitive damages, as well as injunctive and equitable relief. The Amended Complaint alleges federal constitutional claims under 42 U.S.C. § 1983 in Counts I-IV. These claims fall under the jurisdiction of this Court as federal questions pursuant to 28 U.S.C. §§ 1331 and 1343. Count V is a claim for relief pursuant to the Declaratory Judgment Act. Declaratory Judgment actions do not fall under the same jurisdictional jurisprudence because relief is sought under is 28 U.S.C. §§ 2201-2202 and implemented through Rule 57 of the Federal Rules of Civil Procedure which states that the "existence of another adequate remedy does not preclude a declaratory judgment." Fed. R. Civ. P. 57.

Courts are constrained in the Declaratory Judgment context to only act in the face of cases or controversies. All "federal courts, '[have] no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524 (1960). Ms. Knick states that a controversy exists because she "has received from Defendant, Scott Township, Notice of Violation dated April 11, 2013 and October 31, 2014 and consequently her interest in these proceedings is direct, substantial and present and the Enforcement Action undertaken by Scott Township reveals an actual controversy related to the invasion of Plaintiff's constitutionally protected property rights." (*Am. Compl.*, ¶ 45.) Because Ms. Knick's claims in Count I through IV allege violations of her constitutional rights, a case or controversy exists.

In applying the above-factors, it would be inappropriate to stay or dismiss Counts I through IV based on the pending Lackawanna County Court action. The Memorandum and Order issued by the Honorable Terrance Nealon of the Lackawanna County Court appears to indicate that no decision has been rendered on the underlying action filed by Ms. Knick. *Knick v. Scott Township*, 13-CV-2309 (Lacka. Cty.) (Doc. 10-1.)[3] The Defendants argued at the state court level that the action by Ms. Knick was premature and that an attack to the underlying Ordinance had to wait until the Township chose to file civil enforcement proceedings against Ms. Knick. (Doc. 10-1, 15.) Ms. Knick's claims in the current case are premised on the alleged violations of her constitutional rights. Despite her request for a declaratory judgment, her claims in Counts I through V are controlled by federal law and were not a part of her state court filing. Therefore, it would be an abrogation of this Court's jurisdictional obligations to stay these proceedings pending the outcome of the state court action, especially because there is no clarity as to when those proceedings will conclude. Despite my determination to address Ms. Knick's claims in Counts I through IV, as discussed more fully below, I will decline to exercise jurisdiction over the declaratory judgment request and dismiss Count V without prejudice. Additionally, it should be noted that the state action is still pending with regard to Ms. Knick's request for declaratory judgment and injunctive and equitable relief.

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[3] Defendants attached a copy of the Memorandum and Order filed by Judge Terrance Nealon of Lackawanna County Court of Common Pleas, to their Motion to Dismiss (Doc. 10.). As a matter of public record, I can take the Memorandum and Order into consideration in deciding the instant motion. *See Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (citing *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)).

B. Section 1983

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured, . . ." 42 U.S.C. § 1983. "To establish liability under 42 U.S.C. § 1983, a plaintiff must show that the defendants, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury." *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005) (citing *Sameric Corp. of Del., Inc. v. City of Phila.*, 142 F.3d 582, 590 (3d Cir. 1998)). "[M]unicipalities and other local government units [are] to be included among those persons to whom § 1983 applies" and municipalities, "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2035 36, 56 L. Ed. 2d 611 (1978). In *Monell*, the Supreme Court held that a municipality will not be found liable for the unconstitutional acts of a state actor unless the conduct that caused the harm was pursuant to a government policy, custom, or practice. 436 U.S. at 690-91, 98 S. Ct. 2018. Instead, a § 1983 claim against a municipality requires the plaintiff to: (1) identify a policy or custom that deprived him of a federally protected right; (2) demonstrate that the municipality, by its deliberate conduct, acted as the "moving force" behind the alleged deprivation; and (3) establish a direct causal link between the policy or custom and the plaintiff's injury. *Id.*; *See Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

I. Count I–Fourth Amendment Search

Ms. Knick's first claim alleges that Scott Township "maintain(s) a policy, practice, custom or procedure that its Code Enforcement Officer may effectuate warrantless entry onto the private property of citizens within Scott Township," leading to a warrantless entry onto Ms. Knick's property on April 10, 2013. (Doc. 9 at ¶ 26.) It has been previously determined that where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed.2d 114 (1994). The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Fourth Amendment, applied to the states through the Fourteenth Amendment, applies to state government officials in various capacities. *O'Connor v. Ortega*, 480 U.S. 709, 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). The Supreme Court stated in *Michigan v. Tyler*, 436 U.S. 499, 504, 98 S. Ct. 1942, 1947, 56 L. Ed. 2d 486 (1978), that '[t]he decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime." In *Camara v. Municipal Court of the City and Cty of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967), an apartment tenant challenged a complaint filed against him for disallowing entry to a municipal inspector attempting to inspect the apartment for code compliance. The Court held that such searches, permitted under the challenged municipal law, *i.e*, warrantless inspection of a residence, "are significant intrusions upon the interests protected by the Fourth Amendment, [and] that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Id.* at 534, 1733. In *See v. City of Seattle*, 387 U.S. 541, 542, 87 S. Ct. 1737, 1739, 18 L. Ed. 2d 943 (1967), the Court reiterated the holding in *Camara* that "the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code-enforcement inspection of his personal residence" and extended *Camara*'s protections to commercial structures.

Turning to Ms. Knick's claim, a Fourth Amendment inquiry is a "two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 1811, 90 L. Ed. 2d 210 (1986) (citing *Katz v. U.S.*, 389 U.S. 347, 360, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967); *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979)). It can not be disputed that Ms. Knick had a subjective expectation of privacy in her property. There were "No Trespassing" signs posted at intervals as well as stone walls and other natural boundaries surrounding her property. However, a Fourth Amendment violation also requires there be a recognized objective expectation of privacy. In *Oliver v. U.S.*, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214 (1984), the

Court reaffirmed that "an individual may not legitimately demand privacy for activities conducted out of doors, in fields, except in the area immediately surrounding the home." (citing *Hester v. U.S.*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924)). Explaining further, the Court stated that:

> open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. . . For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable.

466 U.S. at 179. Therefore, a property owner should not have a reasonable expectation of privacy in open fields.

Defendants argue that Ms. Knick's Fourth Amendment unlawful search claim should be dismissed because the language of the ordinance provides: "[t]he Code Enforcement Officer and/or his/her agents and representatives may enter upon property within the Township for the purposes of determining the existence of and location of any cemetery, in order to ensure compliance with the terms and provisions of this Ordinance." (Doc. 14 at 7.) In countering Defendants' position, Ms. Knick relies solely on *Camara* in support of the claimed violation of her Fourth Amendment rights. (Doc. 15 at 6.) However, to place such reliance on the case is inappropriate. While *Camara* clearly provides protection for an individual in their home and *See* extends such protection to commercial structures, the area Ms. Knick states was subject to a search was the approximately ninety acres of land she owns, with no specifics as to the precise location. She does not state that there was entry into her home nor to the curtilage of her home. As addressed above, Scott Township can be held liable pursuant to § 1983 under ***Monell*** only where there was a direct link or nexus between the policy or custom of the municipality and a constitutional deprivation. Because Ms. Knick has not plead a claim upon which relief can be granted, namely she has not stated a constitutional deprivation under the Fourth Amendment, Scott Township can not be liable.

Ms. Knick fails to state a claim under the Fourth Amendment for an unconstitutional search of her property and therefore, Count I shall be dismissed.

II. Count II–Fourth Amendment–Failure to Train

Defendants seek dismissal of Ms. Knick's failure to train claim against Scott Township. Ms. Knick alleges that by failing to train and/or "inadequately training its Code Official as to the law with regard to the necessity for obtaining an Administrative warrant prior to conducting an inspection of private property" Scott Township violated her "individually constitutionally protected rights." (*Am. Compl.*, ¶ 30.)

Ms. Knick states the failure to train led to "a deliberate indifference to the Constitutional rights of the citizens of Scott Township, including Plaintiff." (*Id.* at ¶ 31.)

"[A] municipality's failure to properly train its employees and officers can create an actionable violation of a party's constitutional rights under § 1983." *Reitz v. County of Bucks*, 125 F.3d 139, 145 (3d Cir.1997) (citing *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). "In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 563 U.S. 51, 131 S. Ct. 1350, 1359, 179 L. Ed. 2d 417 (2011). Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412 (1989). "Failure to train . . . municipal employees can ordinarily be considered deliberate indifference only where the failure has caused a pattern of violations." *See Berg v. County of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000) (per curiam) (citing *Bd. of Cnty. Comm'rs*, 520 U.S. at 408-09). To attach liability to a municipality, the identified deficiency in the training program must be closely related to the ultimate injury. *Canton*, 489 U.S. at 91. And, as the Supreme Court emphasized "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick,*131 S. Ct. at 1359.

Scott Township could be liable under § 1983 if they failed to train Ferraro and that failure resulted in a violation of Ms. Knick's Fourth Amendment rights. However, because Ms. Knick has failed to plead sufficient facts that could give rise to a Fourth Amendment violation, her claim for failure to train against such alleged violative behavior must also fail. Therefore, Ms. Knick's claim against Scott Township alleging failure to train its Code Enforcement Officer will be dismissed for failure to state a claim upon which relief can be granted.

Ms. Knick seeks punitive damages against Scott Township in her requested relief under Count II. (*Am. Compl.*) Defendants argue that Ms. Knick is not entitled to punitive damages on her claims against Scott Township. (Doc. 10, ¶¶ 46-52.) The Third Circuit has stated "a municipality is immune from punitive damages under 42 U.S.C. § 1983," *Smith v. Borough of Dunmore*, 633 F.3d 176, 183 (3d Cir. 2011) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L. Ed.2d 616 (1981)). Ms. Knick has failed to state a claim under Count II that would permit her to be awarded punitive damages against Scott Township.

III. Count III–Fourth and Fourteenth Amendment Claims Against Ferraro

Ferraro entered on to Ms. Knick's property on April 10, 2013 and did so under color of state law. (*Am. Compl.*, ¶¶ 35-36.) Ms. Knick alleges this entry on to her property was in violation of the Fourth and

Fourteenth Amendments to the United States Constitution, resulting in liability under § 1983. (*Id.* at ¶ 37.) Ms. Knick further alleges that Ferraro's actions were "willful, malicious, and/or were made in reckless disregard of Plaintiff's civil rights" therefore requesting punitive damages. (*Id.* at ¶ 39.) Defendants seeks dismissal of Ms. Knick's claims against Ferraro.

Despite raising the issue for the first time in their reply brief, Defendants argue Ferraro should not be named in his official capacity because Ms. Knick's complaint already names Scott Township with regard to her Fourth Amendment claim (Count I of the Amended Complaint). (Doc. 16, 7 n. 2.) In *Kentucky v. Graham*, 473 U.S. 159, 165 66, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985), the Supreme Court set forth the difference in personal versus official capacity suits. When suing in an individual capacity, "[p]ersonal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law; where "[o]fficial-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Id.* at 165-66 (citing *Monell* 436 U.S. at 690, n. 55, 98 S.Ct. at 2035, n. 55.). "[A] judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond." *Brandon v. Holt*, 469 U.S. 464, 471-72 72, 105 S. Ct. 873, 878, 83 L. Ed. 2d 878 (1985). Therefore, Ms. Knick's claim against Ferraro in his official capacity shall be dismissed. Even if she were to state a claim upon which relief could be granted, a successful suit against Ferraro in his official capacity would impose liability on Scott Township and is therefore, redundant. The claims made in Count III against Ferraro in his official capacity shall be dismissed.

Defendants additionally argue that Ferraro is entitled to qualified immunity for claims made against him in an individual capacity. (Doc 10 at ¶ 45; Doc. 14, 10.) A defendant official may be entitled to qualified immunity or a good faith, affirmative defense. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982). The defense has both an objective and a subjective aspect, with the objective aspect involving a "presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'" *Id.* at 815, 2736 (quoting *Wood v. Strickland*, 420 U.S. 308, 322, 95 S. Ct. 992, 1001, 43 L. Ed.2d 214 (1975)). "Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78 (2015) (quoting *Reichle v. Howards*, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012)). "In considering the applicability of qualified immunity, courts engage in a two-pronged examination[:] [f]irst, a court must decide 'whether the facts that a plaintiff has . . . shown make out a violation of a constitutional right'" and "second, the court must determine 'whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct.'" *Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 637 (3d Cir. 2015) (citing *Pearson v. Callahan*, 555 U.S 233, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). "Courts may begin their consideration with either prong." *Pearson*, 555 U.S at 236. "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093, 182 L. Ed at 985. "[E]xisting precedent must have placed the statutory or constitutional question beyond debate" for a right to be clearly established. *Id.* The Supreme Court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Taylor*, 135 S. Ct. at 2044.

Ms. Knick states Ferraro conducted a search of her property on April 10, 2013. (*Am. Compl.*, ¶ 18.) Ms. Knick has not pled facts with regard to the area he searched nor that the search was in any way contrary to the rights protected under the Fourth Amendment. As discussed above, the Fourth Amendment does not protect against the entry of an official on to open fields. "An officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment." *Pearson*, 555 U.S. at 243-44, 129 S. Ct. at 822. The facts alleged regarding an entry onto the property of Ms. Knick do not rise to the level of a plausible Fourth Amendment violation. Additionally, Ferraro was acting pursuant to the Ordinance. The Ordinance provided for his entry onto property within Scott Township to ensure compliance with the mandates prescribed. (Doc. 14-1.)[4] Therefore, it is reasonable for him to believe that his conduct complied with the law and thus, Ferraro should be entitled to qualified immunity.

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[4] Because I may consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss, the text of the Ordinance will be considered. *Pension Benefit Guar.*, 998 F.2d at 1196.

With regard to Ms. Knick's request for punitive damages against Ferraro, "[p]unitive damages may be awarded in a § 1983 action only where 'the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Smith v. Cent. Dauphin Sch. Dist.*, 419 F. Supp. 2d 639, 649 (M.D. Pa. 2005) (citing *Smith v. Wade*, 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983)). Ms. Knick has failed to plead any facts regarding evil motive or intent and rather simply states that "Defendant Ferraro's actions as complained of, were willful, malicious, and/or were made in reckless disregard of Plaintiff's civil rights." (*Am. Compl.*, ¶ 39.) As stated above, "mere conclusory statements will not do." *Fowler*, 578 F.3d at 210. Ms. Knick has not pled any factual allegations to substantiate the conclusory statement in the Amended Complaint and therefore, she has failed to state a claim upon which the requested relief can be granted. Ms. Knick's claims against Ferraro both in his official and individual capacity shall be dismissed.

IV. Count IV–First, Fourth, Fifth and Fourteenth Amendment Claims

Ms. Knick alleges that Scott Township enacted "special legislation" when they enacted the Ordinance, and the enactment of the Ordinance was accomplished in retaliation for the exercise of her First Amendment Rights. (*Am. Compl.*, ¶ 41.) The Ordinance is also alleged to be violative of Ms. Knick's rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. (*Id.*) Ms. Knick states the

Ordinance is "illegal, unconstitutional and without force of law." (*Id.*) Count IV of the Amended Complaint provides several overlapping alleged violations of her constitutional rights. Defendants have moved to dismiss all of Count IV, arguing Ms. Knick has failed to plead sufficient facts to withstand their 12(b)(6) challenge. The claims are addressed below in the order raised, however, I agree with Defendants that Count IV of the Amended Complaint fails to state a claim upon which relief can be granted, and therefore, shall be dismissed.

a. Ordinance Vague

Ms. Knick first alleges that the Ordinance's provisions are vague. (*Am. Compl.*, ¶ 41(b)). In support of her allegation, Ms. Knick, states that the Ordinance contains "no objective criteria to define the existence of a cemetery or burial ground." (Doc. 15 at 12.) A void-for-vagueness challenge requires a court to ensure fairness in a statute or standard so as not to be so vague that a "party would not know the conduct is prohibited." *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 166 (3d Cir. 2008); *See also San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992). Thus, a statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning." *Borden*, 523 F.3d at 166-67 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 607, 93 S.Ct. 2908 (1973)) (citations omitted). The statute or standard is reviewed on a case-by-case basis, and "the party opposing the statute or standard must show that it is vague as applied to him." *Borden*, 523 F.3d at 167; *San Filippo*, 961 F.2d at 1136. Additionally, "in the civil context, statutes need not be as precise as in the criminal context and are, therefore, less likely to be invalidated under a void-for-vagueness challenge." *Borden*, 523 F.3d at 167; *San Filippo*, 961 F.2d at 1135. In *Town of McCandless v. Bellisario*, 709 A. 2d 379, 381, 551 Pa. 83,87 (Pa. 1997), the Pennsylvania Supreme Court set forth that municipal ordinances that do "not provide for imprisonment upon conviction or failure to pay a fine or penalty . . . are not Penal laws." The language of the Ordinance relating to penalties for non-compliance provides:

> 7.) **Violations/Penalties/Enforcement** – Any person or owner who violates or permits a violation of the Ordinance, upon being found liable therefore in a civil enforcement proceeding before a District Justice or Magisterial District Justice, shall pay a fine and/or penalty of not less than Three Hundred ($ 300.00) Dollars nor more than Six Hundred ($ 600.00) Dollars per violation, plus all court costs, including reasonable attorney's fees incurred by the Township in the enforcement of this Ordinance. Each day that the violation exists shall constitute a separate offense. In any case where penalty for the violation has not been timely paid, and the person against whom the penalty is imposed is found to have been liable therefore in civil proceedings, the violator shall be liable for the penalty imposed including additional reasonable attorney's fees incurred by the Township in any enforcement proceedings. If the violator neither pays nor timely appeals the judgment, once final, the Township may enforce the judgment pursuant to the applicable rules of civil procedure.

> Nothing contained herein shall preclude the Township and/or Code Enforcement Officer from instituting any other appropriate civil or equitable proceedings to restrain, correct or abate a violation of this Ordinance as may be allowed for under any and all appropriate laws, statutes, Ordinances and/or regulations.

(Doc. 14-1 at 2.) The Ordinance does not provide for the possibility of imprisonment for failure to pay or for noncompliance and is strictly limited to civil and equitable remedies. Ms. Knick argues that the "lack of specific objective criteria in the Scott Township 'Cemetery Ordinance' creates a law so indefinite as to allow arbitrary and discriminatory enforcement and the Ordinance fails Constitutional compliance." (Doc. 15 at 12.) Ms. Knick relies on *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed.2d 447 (1966), for the principles of constitutional compliance of a statute or standard. (Doc. 15 , 12.) However, Ms. Knick fails to address how these principles should be applied in the current case, despite asserting that the Ordinance fails to comport. (*Id.*) In *Giaccio*, the Supreme Court invalidated a Pennsylvania statute allowing a jury to assess whether a defendant who is acquitted on the underlying offense, should be liable for costs; and permitted incarceration of the defendant until costs are paid. *Id.* at 401. Because there were no guidelines for how a jury was to make the determination of whether an acquitted Defendant was assessed costs and subject to possible incarceration, the Court deemed the statute too vague to be enforced stating:

> Certainly one of the basic purposes of the Due Process Clause has always been to

> protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.

Id. at 403.[5] The Ordinance in the current case does not suffer from the same infirmities. Ms. Knick argues that the Ordinance "essentially allows the officials of Scott Township to point to any parcel of land, claim it as a cemetery and then endeavor to enforce the provisions of Ordinance." (Doc. 15 , 12.) Despite this allegation, the Ordinance contains a definition section that provides the definitions for a Burial Place as "A portion of ground either occupied by a tomb or grave or set apart for a tomb or grave for burial of the dead." (Doc. 14-1, 1.) Additionally, a Cemetery is defined by the Ordinance as "A place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." (*Id.*) Ms. Knick argues that because the Ordinance does not require "a reservation in the chain of title, registration with agencies of the Commonwealth of Pennsylvania, physical indicia of the existence of a cemetery in the form of tombstones and the conducting or record of conducting internments of deceased humans," the Ordinance is unconstitutionally vague. (Doc. 15, 12.) I find the Ordinance sufficiently provides for the definition of such areas of land and therefore, the Ordinance is not void-for-vagueness. The parameters of the regulated area are sufficiently defined. Ms. Knick has failed to allege any facts to demonstrating how the Ordinance is vague as applied to her property and to make her claim that the Ordinance is too vague plausible.

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[5] Ms. Knick additionally cites to *City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S. Ct. 1859, 144 L.Ed.2d 67 (1999) (holding that a statute criminalizing the failure to disperse after being warned by a police officer that the individual was impermissibly loitering with a gang member, without further defining loitering or prohibited conduct, was void for vagueness) and *Tucson Woman's Clinic v. Eden*, 379 F. 3d 531, 554 (9th Cir. 2004) (invalidating a provision of an abortion clinic regulation that required providers to "ensure that a patient is afforded the following rights, and is informed of these rights: [ ] To be treated with consideration, respect, and full recognition of the patient's dignity and individuality" as unconstitutionally vague and "too subjective for providers to know how they should behave in order to comply, as well as too vague to limit arbitrary enforcement.") (Doc. 15, 12.) The Ordinance does not suffer from the same lack of defining language and therefore the provisions at issue are distinguishable.

b. Penal Regulation–Ex Post Facto

Ms. Knick contends that the Ordinance "creates a retroactive penal regulation regarding private property in violation of the prohibition against ex post facto laws." (*Am. Compl.*, ¶ 41(b).) Neither party has expanded on this alleged deprivation in their briefing. *See* LR 7.6 of the Local Rules for the Middle District of Pennsylvania. However, as I set forth above, the Pennsylvania Supreme Court has held that a municipal ordinance that does "not provide for imprisonment upon conviction or failure to pay a fine or penalty . . . [is] not [a] Penal law." *Town of McCandless*, 709 A. 2d at 381, 551 Pa. at 87. Therefore, Ms. Knick has failed to alleged sufficient facts to state a claim that the Ordinance is a penal ordinance that provides for retroactive penal regulation. The conclusory statement does not provide any basis for relief.

c. Fourteenth Amendment Challenge

Ms. Knick's initial claims or bases alleged unconstitutionality in Count IV will be considered a facial challenge to the Ordinance. When asserting a facial challenge, a party "seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question." *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 623 (3d Cir. 2013) (quoting *City of Chi. v. Morales*, 527 U.S. 41, 55 n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999)). "In a facial challenge, the plaintiff does not seek to establish that the law cannot be applied to him; rather, he or she must show that 'no set of circumstances exists under which the [challenged] Act would be valid.'" *CMR D.N. Corp.*, 703 F. 3d at 623 (quoting *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir.2011)) (citations omitted).

Ms. Knick alleges that the provisions of the Ordinance are "unreasonable and have no rationale [sic] relation to the promotion of the public health and safety and exist as an improper exercise of the Township Police power." (*Am. Compl.*, ¶ 41(c).) Such a statement concedes that the Ordinance should be subject to rational basis review, however, Ms. Knick has failed to expand on her claim that the enactment of the Ordinance bears no rational relationship to the public health and safety of Scott Township residents in her brief in opposition. Therefore, the Ordinance will be considered under rational basis review. "Under rational basis review, "a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute." *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir. 1997) (quoting *Sammon v. New Jersey Bd. Of Medical Examiners*, 66 F. 3d 639, 646 (3d Cir. 1995)). The Third Circuit has cautioned that "a court engaging in rational basis review is not entitled to second guess the legislature on the factual assumptions or policy considerations underlying the statute . . . The sole permitted inquiry is whether the legislature rationally might have believed the predicted reaction would occur or that the desired end would be served." *Sammon*, 66 F.3d at 645.

The Ordinance on its face states that Scott Township, through the Second Class Township Code, grants the Supervisors the ability "to adopt Ordinances in which general or specific powers of the Township may be exercised in order to promote the health, safety and welfare of its residents." (Doc. 14-1, 1.) The Ordinance further states "the Board of Supervisors of Scott Township believes that regulating cemeteries within the Township serves in the best interest of the Township." (*Id.*) The Supervisors stated their belief in the text of the Ordinance that the enactment of the Ordinance was in furtherance of the health, safety and welfare of the residents of Scott Township. Because resident health, safety and welfare are legitimate state interests, it is rational to believe that regulating places of burial would serve that need, and therefore, the Ordinance survives rational basis review.

Ms. Knick raises various other challenges to the Ordinance as unconstitutional as-applied to her and, as warranted, those claims are addressed below.

d. Public Taking

Ms. Knick sets forth a claim that the provision of the Ordinance that states that "all cemeteries within the Township shall be kept open and accessible to the general public during day light hours" amounts to a "public taking without just compensation." (*Am. Compl.*, ¶ 41(d).) This challenge is a facial attack to the Ordinance.

The Takings Clause of the Fifth Amendment prohibits the federal government from taking private property for public use without providing just compensation, *see* U.S. Const. amend. V, and the Takings Clause applies to state action through the Fourteenth Amendment. *See Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 370 (3d Cir. 2012). Takings claims generally fall into two categories: physical and regulatory. *See Yee v. City of Escondito*, 503 U.S. 519, 522-23, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1982). A physical taking occurs when there is either a condemnation or a physical appropriation of property. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002). By contrast, a regulatory taking occurs when "government regulation of private property [is] . . . so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922)). A regulation violates the Takings Clause "where government requires an owner to suffer a permanent physical invasion of her property," or where the owner is completely deprived of "all economically beneficial use" of the property. *Id.* at 538. (internal citations omitted).

The type of takings inquiry depends on the type of attack leveled against the government action. "The Supreme Court has held that an as-applied Fifth Amendment Just Compensation Takings claim against a municipality's enforcement of a zoning ordinance is not ripe until (1) 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue' (the 'finality rule'), and (2) the plaintiff has unsuccessfully exhausted the state's procedures for seeking 'just compensation,' so long as the procedures provided by the state were adequate." *Cnty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) (citing *Williamson County Regional Planning Com. v. Hamilton Bank*, 473 U.S. 172, 186, 194-95, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)). However, when a facial attack is made to an ordinance, *i.e.*, "a claim that the mere enactment of a regulation either constitutes a taking without just compensation, or a substantive violation of due process or equal protection", a "final decision" is not necessary." *Cnty Concrete Corp.*, 442 F. 3d at 164. This is because "when a landowner makes a facial challenge, he or she argues that any application of the regulation is unconstitutional; for an as-applied challenge, the landowner is only attacking the decision that applied the regulation to his or her property, not the regulation in general."' *Id.* (quoting *Eide v. Sarasota County*, 908 F.2d 716, 724 n. 14 (11th Cir.1990)).

Ms. Knick alleges that the Ordinance is a taking as enacted. However, she fails to plead any facts that would make her claim plausible that the enactment of the Ordinance amounts to a taking. The broad statement that the Ordinance "exists as an effort at public taking without compensation" and the reiteration of the Ordinance's language does not suffice to state a claim. (*Am. Compl.*, ¶ 41(d).)

Other than to state that the "application of the Ordinance to Plaintiff's private property actually creates a nuisance by mandating public access to and across Plaintiff's private property which is otherwise not open to the public," the Amended Complaint contains no allegation regarding an as-applied taking. (*Am. Compl.*, ¶ 41(e).) Therefore, Ms. Knick fails to plead facts that state she has suffered a taking through application of the Ordinance to her property.[6]

e. Nuisance

As addressed above, Ms. Knick appears to conflate a nuisance with an as-applied taking, however, she fails to put forth how the value of her property is regulated or diminished by the application of the

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[6] Even if Ms. Knick were to plead sufficient facts to demonstrate an as-applied taking, her claim would likely fail due to the ripeness doctrine which "serves to determine whether a party has brought an action prematurely and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine." *Cnty Concrete Corp.*, 442 F. 3d at 164 (citing *Khodara Envtl., Inc. v. Blakey*, 376 F. 3d. 187, 196 (3d Cir. 2004)) (citations omitted). Ms. Knick has pled no facts about the finality of a determination regarding application of the Ordinance to her property and notably stated in her brief in opposition that "any effort by Scott Township to enforce the provisions of the "Cemetery Ordinance" against Knick property is unlikely." (Doc. 15, 11.)

Ordinance. Therefore, construing the nuisance language to allege an as-applied Taking, Ms. Knick has failed to plead facts to support her allegation that the "application of the Ordinance to Plaintiff's private property actually creates a nuisance by mandating public access to and across Plaintiff's private property which is otherwise not open to the public." (*Am. Compl.*, ¶ 41(e).)

f. Due Process and Retaliation

The Amended Complaint alleges that Defendant's enactment of the Ordinance and their attempt at enforcement "bear no relationship to the promotion of public health and safety, and both the enactment and enforcement were designed to harass Plaintiff and to otherwise discourage her from further exercise of her First Amendment Rights of Free Speech and Expression." (*Am. Compl.*, ¶ 41(f).) Ms. Knick alleges violations of her Fourteenth Amendment rights to Due Process, and that the action by Defendants was in retaliation for the exercise of her First Amendment Rights.

1. Due Process

Ms. Knick alleges a Fourteenth Amendment claim in Count IV. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that a state shall not "deprive any person of life, liberty, or property, without due process of law; . . ." U.S. Const. amend. XIV, § 1. Due process under the Fourteenth Amendment has both "substantive and procedural components." *Evans v. Sec'y Pa. Dep't of Corr.*, 645 F.3d 650, 658 (3d Cir. 2011).

A. Substantive Due Process

In Count IV, Ms. Knick alleges a violation of her substantive due process rights with regard to her real property. "The substantive component of the Due Process Clause limits what government may do regardless of the fairness of procedures that it employs." *Evans*, 645 F.3d at 659 (citing *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 399 (3d Cir. 2000)). According to the Third Circuit, "the fabric of substantive due process . . . encompasses at least two very different threads." *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000). The first of these threads applies when a "plaintiff challenges a legislative act." *Id.* The second thread "protects against certain types of non-legislative action," where "deprivation of a property interest is 'arbitrary, irrational, or tainted by improper motive'" *Id.* (quoting *Woodwind Estates, Ltd. v. Gretkowski*, 205 F. 3d 118, 123 (3d Cir. 2000)).

First, Ms. Knick has challenged the enactment of the Ordinance and therefore, challenges a legislative act. "[A] legislative act will withstand substantive due process challenge if the government "identifies a legitimate state interest that the legislature could rationally conclude was served by the statute," although legislative acts that burden certain 'fundamental' rights may be subject to stricter scrutiny." *Nicholas*, 227 F.3d at 139; *Alexander v. Whitman*, 114 F.3d 1392, 1403 (3d Cir.1997) (quoting *Sammon*, 66 F.3d at 645). As stated above, the Ordinance survives rational basis review in that it was purportedly enacted to further the health, safety and welfare of the citizens of Scott Township, and therefore, Ms. Knick's claim for a substantive due process violation must fail.

As to challenges that fall under the second thread, non-legislative acts, a plaintiff must prove that the interest at issue is "protected by the substantive due process clause and the government's deprivation of that protected interest shocks the conscience." *Chainey v. Street*, 523 F.3d 200, 219 (3d Cir. 2008). The plaintiff must establish "as a threshold matter that he has a protected property interest to which the Fourteenth Amendment due process protection applies." *Nicholas*, 227 F. 3d at 139-40 (quoting *Woodwind Estates*, 205 F. 3d at 118. The Third Circuit has stated that a plaintiff alleges a property interest worthy of substantive due process protection "in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property." *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600-01 (3d Cir. 1995), *abrogated on other grounds by United Artists Theatre Cir., Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003). Ms. Knick has a protected interest in her property. However, that does not end the inquiry. Ms. Knick has failed to plead any facts regarding actions on behalf of Defendants that "shock the conscience." In order to be a violation of substantive due process, a plaintiff must allege how the government action shocks the conscience. Such has not been stated in Ms Knick's Amended Complaint. There have additionally been no facts pled regarding an arbitrary application of the Ordinance to Ms. Knick. The Ordinance was applied as written when the notice of violation was sent and there is nothing contained in the Amended Complaint to substantiate that the Ordinance was applied arbitrarily to Ms. Knick or that it was not applied to any other citizen of Scott Township. Therefore, Ms. Knick's substantive due process claims shall be dismissed.

B. Procedural Due Process

Ms. Knick alleges broadly that the application of the Ordinance to her property is unconstitutional and because she alleges Fourteenth Amendment violations, a procedural due process claim will be considered. Ms. Knick fails to expand upon her allegation of a violation of procedural due process.

"To state a claim under § 1983 for deprivation of procedural due process rights, a plaintiff must allege that (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of 'life, liberty, or property,' and (2) the procedures available to him did not provide 'due process of law.'" *Hill v. Borough of Kutztown*, 455 F.3d 225, 233-34 (3d Cir. 2006) (citing *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000)). For purposes of procedural due process, courts look to state law to determine whether a property interest exists. *Dee v. Borough of Dunmore*, 549 F.3d 225, 229 (3d Cir. 2008) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) ("Property interests are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.")). "A procedural due process claim requires . . . consider[ation of] three factors: (1) the private interest affected by the official action; (2) the risk that the plaintiff will suffer an erroneous deprivation through the procedure used and the probable value if any of additional procedural safeguards; and (3) the government's interest." *Reichley v. Pennsylvania Dep't of Agric.*, 427 F.3d 236, 246 (3d Cir. 2005) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Notwithstanding Ms. Knick's failure to plead sufficient facts for a procedural due process claim, any allegation, even if a cursory statement, of such a deprivation is without merit. Despite Ms. Knick's clear interest in the use and enjoyment of her property, she has pled nothing more than conclusory statements regarding the fact that her property will be adversely affected by the Ordinance.[7] The risk of erroneous deprivation through the procedure, *i.e.*, the issuance of an notice of violation and possible civil enforcement proceedings, used is minimal. The Ordinance specifically lays out that, upon the exercise of enforcement proceedings by Scott Township, she must be found liable for violation of the Ordinance. (Doc. 14-1, 2.) There is an important government interest involved. The Ordinance provides that the adoption of the Ordinance is "in order to promote the health, safety and welfare of its residents." (Doc. 14-1, 1.) The weighing of the factors does not lead to a determination in Ms. Knick's favor. The procedural due process claim shall be dismissed.

2. Retaliation

Ms. Knick alleges that the Ordinance was enacted in retaliation for the exercise of her First Amendment rights. (*Am. Compl.*, ¶¶ 41(f), 47(f).)

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[7] Ms. Knick has additionally failed to allege facts that there has been a finality of decision with regard to the application of the Ordinance to her property.

A First Amendment retaliation claim requires "(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." *Thomas v. Independence Twp.*, 463 F.3d 285, 296 (3d Cir. 2006) (citing *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003)). Ms. Knick has attended meetings of the Scott Township Supervisors regularly and has confronted the "Supervisors and Administrative Officials with respect to the expenditure of funds, tax revenue issues and various Municipal decisions." (*Am. Compl.*, ¶ 15.) The Supervisors and Officials, including Ferraro, have "expressed their annoyance, aggravation and displeasure, both publicly and privately, regarding Plantiff['s] . . .exercise of her First Amendment Rights." (*Am. Compl.*, ¶ 16.) Ms. Knick alleges that the enactment of the Ordinance and subsequent attempts at enforcement were retaliatory actions in response to her exercise of her First Amendment Rights. (*Id.* at ¶ 41(f).)

The Third Circuit has reiterated that the First Amendment forbids retaliation for speech even about private matters. *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 284 (3d Cir. 2004) (deeming speech addressing private grievances at supervisors' meetings was entitled to First Amendment Protection). *Eichenlaub* further stated that "private speech (unless obscene or fighting words or the like) is still protected on the First Amendment ladder." *Id.* Ms. Knick's statements at Supervisors' meetings would similarly be entitled to First Amendment protection. The first prong of the standard for retaliatory actions has been met.

However, Ms. Knick has failed to plead facts sufficient to state a claim for retaliation against her by Defendants. Ms. Knick simply makes a conclusory statement that "Scott Township enacted "Special Legislation" designed to harass her and to chill her in the exercise of her First Amendment Rights." (Doc. 15, 10.) The Amended Complaint fails to set forth facts how the enactment of the Ordinance was in fact connected to her statements at meetings, nor how the enactment of such would deter a person of reasonable firmness from exercising their rights. Therefore, her claim for First Amendment retaliation shall be dismissed. However, as stated below, Ms. Knick shall be given an opportunity to amend her complaint in order to state a claim for First Amendment Retaliation.

g. Fourth Amendment

Ms. Knick cites her allegation that the Ordinance attempts to "grant to the Township rights to access private property which are violative of the Fourth Amendment of the United States Constitution." (*Am. Compl.*, ¶ 41(g).) This allegation is construed to be a facial challenge to Ordinance with regard to the Fourth Amendment. The Fourth Amendment, applicable to the states through the Fourteenth Amendment, states that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV. The controlling question that must be answered is whether there is a "constitutionally protected reasonable expectation of privacy." *Ciraolo*, 476 U.S. at 211, 106 S. Ct. at 1811. As discussed at length above, there is not a constitutionally protected objective reasonable expectation of privacy in open fields. There is no Fourth Amendment violation as the Ordinance applies to Ms. Knick and to speculate that a situation will arise in Scott Township where a cemetery or burial ground will be alleged to be contained in a residence, the curtilage surrounding a residence or commercial structure, would be inappropriate.

V. COUNT V

1. Declaratory Judgment

As discussed above at length, I have discretion with regard to the exercise of jurisdiction over a request for declaratory judgment. Ms. Knick requests that I issue a Declaratory Judgment deeming the Ordinance unconstitutional. (*Am. Compl.*, ¶ 52(a).) In support of her contention that the Ordinance is unconstitutional, Ms. Knick reiterates the allegations of Count IV.

In determining whether to exercise jurisdiction a court is to consider if a declarative judgment would serve any purpose beyond the underlying claim. *Westfall T.p. v. Darwin Nat. Assur. Co.*, No. 14 CV 1654, 2015 WL 106578, at *7 (M.D. Pa. Jan. 7, 2015). I have stated:

> the question is whether, taking all facts in a light most favorable to the plaintiff, Plaintiff has stated a declaratory relief claim that will serve a useful purpose in clarifying and settling the legal relations in issue, and will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

and that "[w]hile a party may plead alternative statements of a claim, a district judge may dismiss a claim for declaratory relief if it is duplicative of a contract or other claim." *Id.* Because a declaratory judgment in this case is duplicative of the coercive claims in Ms. Knick's Amended Complaint, I will exercise my discretion to decline to issue a declaratory judgement. Because Ms. Knick has failed to state claims for constitutional violations, I will not issue a further declaratory judgment with regard to the constitutionality of the Ordinance. I will dismiss Count V without prejudice.

Ms. Knick additionally requests a Declaration of Rights, without which she alleges she "will be uncertain of her rights and responsibilities under the law." (*Am. Compl.*, ¶ 46.) As addressed at length above, Ms. Knick has failed to state a claim for constitutional violations, therefore, no further declaration of rights and responsibilities will be issued. Scott Township has yet to institute civil enforcement proceedings against Ms. Knick. Therefore, it would be inappropriate to address rights and responsibilities at this time.

2. Temporary Restraining Order/Preliminary Injunctive Relief

Ms. Knick has additionally requested that a temporary restraining order and preliminary injunctive relief be issued. (*Am. Compl.*, Count V.) The following four factors are to be considered by a court ruling on a motion for a preliminary injunction:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be

> irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Gerardi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994). These same factors are used to determine a motion for a temporary restraining order. *Lozano v. City of Hazleton*, 459. F. Supp. 332, 335 (M.D. Pa. 2006).

Ms. Knick alleges in the Amended Complaint that she is "entitled to a Temporary Restraining Order, as well as a Preliminary and Permanent Injunction." (*Am. Compl.* at ¶ 45.) According to Ms. Knick, she "will suffer irreparable injury and will continue to suffer real and immediate threat of irreparable injury as the result of the existence, operation, enforcement and threat of enforcement of the challenged Ordinance" and she has "no adequate or speedy remedy at law." (*Id.* at ¶ 44.) Ms. Knick alleges the harm to her "as a result of Defendants' attempts to enforce an unconstitutional and void Ordinance is substantial" (*Id.* at ¶ 48.); that unless Defendants are enjoined, she will be deprived of her constitutionally protected rights (*Id.* at ¶ 49.); that "no harm or prejudice will result to Defendants if relief is granted" (*Id.* at ¶ 50.); she has no adequate remedy at law (*Id.* at ¶ 51.); and her "right to relief is clear." (*Id.* at ¶ 52.) Ms. Knick has failed to allege facts that demonstrate her entitlement to the relief requested. She has offered nothing more than mere conclusory legal statements. Therefore, I will not grant her request for a Temporary Restraining Order, nor preliminary injunctive relief.

3. Permanent Injunctive relief

Because Ms. Knick's Amended Complaint will be dismissed in its entirety, permanent injunctive relief is not appropriate.

VI. Conclusion

For the above stated reasons, Defendants' motion to dismiss will be granted. However, the Third Circuit has instructed that a district court must permit a curative amendment if a claim is vulnerable to a 12(b)(6) dismissal, unless amendment would be inequitable or futile. *See Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008). Because it is not certain that amendment of Count IV would be futile, Ms. Knick will be permitted one opportunity to amend her pleading to state a claim consistent with this Memorandum. I believe it would be futile to permit amendment of Counts I through III based on the determination that no relief can be granted for the claimed violation of Ms. Knicks's Fourth Amendment rights.

An appropriate order follows.

October 28, 2015	/s/ A. Richard Caputo
Date	A. Richard Caputo United States District Judge

Document 20 Filed 10/29/2015

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROSE MARY KNICK,

Plaintiff,

v.

SCOTT TOWNSHIP, et al.,

Defendants,

CIVIL ACTION NO.
3:14-CV-2223
(JUDGE CAPUTO)

ORDER

NOW, this 28th day of October, 2015, in accordance with the accompanying Memorandum, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Doc. 10), Counts I through III, is **GRANTED**. These counts are dismissed with prejudice.
2. Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Doc. 10), Count IV, is **GRANTED**. Plaintiff has **twenty-one (21) days** from the date of entry of this Order to file an amended pleading. If she fails to do so, the action will be dismissed with prejudice and the case will be closed.
3. Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Doc. 10), Count V, is

GRANTED. This count is dismissed without prejudice.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Court

Document 21 Filed 11/16/2015

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

ROSE MARY KNICK	CIVIL ACTION – LAW
Plaintiff	JURY TRIAL DEMANDED
vs.	
SCOTT TOWNSHIP	NO.: 3:14-CV-02223-ARC
Defendant	[ELECTRONICALLY FILED]

SECOND AMENDED COMPLAINT

AND NOW comes Plaintiff, Rose Mary Knick, by and through her attorney, Frank J. Bolock, Jr., Esquire, who files this Second Amended Complaint against Defendant above-named as follows:

I. INTRODUCTION

1. Plaintiff, Rose Mary Knick, brings this action seeking Declaratory Judgment, Preliminary and Permanent Injunctive Relief, a Temporary Restraining Order and monetary damages arising out of Defendant's violation of the Constitution and laws of the United States. Plaintiff's claim seeking monetary damages to address the deprivation of her civil rights is brought pursuant to 42 U.S.C. Section 1983. Plaintiff alleges that she was subjected to an unlawful search of her property on or about April 10, 2013, in violation of her rights under the Fourth Amendment of the United States Constitution. In addition, Scott Township enacted an ordinance—Ordinance 12-12-20-001—that violates the takings

Clause of the Fifth Amendment both on its face and as-applied because it authorizes a physical invasion and seizure of Plaintiff's private land.

Plaintiff seeks relief in the nature of a Declaratory Judgment declaring Ordinance No. 12-12-20-001 unconstitutional. The Defendant's unlawful actions have caused Plaintiff emotional distress and economic losses. The Plaintiff seeks economic damages, compensatory and punitive damages, attorneys' fees and costs of this action.

II. JURISDICTION AND VENUE

2. This action arises under the Constitution and Laws of the United States, including 42 U.S.C. Section 1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. Section 1331 and 1343.

3. The Court is authorized to grant Declaratory Judgment under the Declaratory Judgment Act, 28 U.S.C. Section 2201, 2202 implemented through Rule 57 of the Federal Rules of Civil Procedure, and to issue the Temporary Restraining Order, and the Injunctive Relief request by Plaintiff under Rule 65 of the Federal Rules of Civil Procedure.

4. Venue herein is the proper in this district pursuant to 28 U.S.C. Section 1391(b). All of the acts complained of herein occurred within this judicial district.

III. PARTIES

5. Plaintiff, Rose Mary Knick, is a United States citizen residing at 49 Country Club Road, Scott Township, County of Lackawanna, Commonwealth of Pennsylvania 18433.

6. Defendant, Scott Township, is a political sub-division of the Commonwealth of Pennsylvania, organized and existing in accordance with the laws of Pennsylvania with a designation as a Township of the Second Class. Defendant, Scott Township's principal office is located at 1038 Montdale Road, Scott Township, County of Lackawanna, Commonwealth of Pennsylvania. Scott Township, as a Municipal entity, is capable of being sued under 42 U.S.C. Section 1983, and is subject to the jurisdiction of this Court.

IV. STATEMENT OF FACTS

7. Plaintiff, Rose Mary Knick, is the owner of the real estate located at 49 Country Club Road, Scott Township, County of Lackawanna, Commonwealth of Pennsylvania. The Knick property (hereinafter referred to as "the Premises") is comprised of two parcels intersected by Country Club Road. The Premises consists of approximately 90 acres. The Premises has been continuously owned and occupied by Rose Mary Knick and/or members of her family dating back from 1970 continuing up through the present time. The Premises has been utilized over the years as the primary residence for Rose Mary Knick and members of her family, as a cultivated farmland, grazing area for horses, cattle and other farm animals.

8. At all times relevant hereto the Premises has been posted at regular intervals, "No Trespassing." The Premises is bounded by stonewalls, fences and other boundary markers.

9. Plaintiff, Rose Mary Knick, a conscientious citizen, taxpayer advocate frequently attends meetings of the Scott Township Supervisors and regularly confronts the Scott Township Board of

Supervisors and administrative officials with respect to expenditure of funds, tax revenue issues and municipal decisions.

10. In September 2008, apparently, in response to a citizen inquiry regarding an alleged existence of an ancient burial ground on the Premises, The Scott Township Supervisors and Township Solicitor discussed the issue of the alleged burial ground at several public meetings.

11. In 2008 and early 2009 Plaintiff, Rose Mary Knick, individually and through her then Counsel, Attorney Robert Cecchini, made a Right-To-Know request of the Scott Township Supervisors as to the particulars regarding the suggestion that a burial ground was situate on her property. Rose Mary Knick, individually and through her Counsel, advised the Scott Township Supervisors that there was no designation in the chain of title regarding the Premises regarding the existence of a burial ground or cemetery on the Premises. Further, Plaintiff and her Counsel advised Scott Township that there was no physical evidence of the existence of a burial ground or cemetery on the Premises.

12. Plaintiff has never opened her property to the general public for cemetery viewing, hiking or the like. There is no recorded access easement on her property.

13. In correspondence dated October 23, 2008, Plaintiff, Rose Mary Knick through her Attorney, Robert Cecchini, provided Scott Township through their Solicitor with correspondence confirming that in fact the Premises had no designated burial ground, grave, grave yard or cemetery and further that his

review of the chain of title and other documentation confirmed that there had never been any designation, registration or documentation establishing the existence of a cemetery, burial ground or grave yard on the Premises.

14. In December of 2012, the Scott Township Board of Supervisors, enacted an Ordinance, specifically Ordinance 12-12-20-001, purporting to regulate the existence, operation and maintenance of cemeteries within Scott Township.

15. The Ordinance defines a cemetery as "A place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings."

16. The Ordinance authorizes the Township's "Code Enforcement Officer and/or/his/her agents and representatives" to "enter upon *any* property within the Township for the purposes of determining the existence of and location of any cemetery . . ."

17. The Ordinance states that "All cemeteries within the Township shall be kept open and accessible to the general public during daylight hours."

18. The Ordinance states the "[a]ll cemeteries, whether private or public, and whether existing or established prior to the date of this Ordinance or hereafter created, are subject to" its terms.

19. The Scott Township Board of Supervisors determined they would attempt to impose the provisions and restrictions of Ordinance 12-12-20-001 upon the Plaintiff and Plaintiff's premises.

20. On April 10, 2013, the Scott Township Code Enforcement Officer, following a collective determination by the Township Supervisors, without benefit of permission and without an Administrative warrant, entered onto the Knick premises.

21. On April 11, 2013, Scott Township issued a Notice of Violation confirming that the Township's officers had entered onto the Knick property and alleging that the Knick premises contained a burial ground which existed in violation of the Scott Township Ordinance 12-12-20-001. Plaintiff believes the alleged burial ground consists of a few stones and boulders situated on a portion of Plaintiff's property located approximately 300 yards in from the nearest public roadway. To access the area alleged burial ground by way of the most direct route from the roadway, one must cross a fenced and gated field, and proceed through rough terrain and over a water drainage area made at least in part by a natural spring. The Notice is attached to the Complaint as Exhibit "A" and incorporated herein by reference.

22. The Notice informed Plaintiff she was in violation of the Ordinance, in part because the purported burial ground on her land was not open and accessible to the public.

23. On or about May 7, 2013, Plaintiff, Rose Mary Knick, filed a Complaint in the Court of Common Pleas of Lackawanna County seeking Declaratory and Injunctive Relief requesting that the Court: a) declare the Scott Township Ordinance 12-12-20-001 was unconstitutional, void, ineffective and without force; b) declare that Scott Township is precluded from enforcing said Ordinance against Plaintiff and decree and that the Notice of Violation

dated April 11, 2013 is nullified; c) grant equitable relief in the form of a Special Injunction preliminarily following hearing and permanently thereafter to preclude and enjoin Scott Township from enforcing Ordinance 12-12-20-001; and, d) grant such other and appropriate relief including the award of attorneys' fees.

24. The Plaintiff, Rose Mary Knick, through Counsel provided Defendant, Scott Township, with notice regarding the presentation of an Emergency Motion for Injunctive Relief on or about May 7, 2013 and Scott Township through their Solicitor stipulated and agreed to the entry of an Order which provided:

> "ORDER
>
> AND NOW, this 9th day of May, 2013, upon consideration of the Plaintiff's Emergency Motion for Injunctive Relief, Defendant Scott Township's agreement to withdraw its Notice of Violation dated April 11, 2013, and in accordance with a Stipulation of Counsel for the Parties it is Hereby Ordered that all proceedings by Defendant Scott Township to enforce Ordinance No. 12-12-20-001 against Plaintiff Rose Mary Knick are Stayed pending the resolution of the issues raised in the underlying Complaint seeking Declaratory and Injunctive Relief.
>
> S/Nealon J."

25. A Hearing regarding Plaintiff's Complaint for Declaratory Judgment was eventually conducted by the Court of Common Pleas of Lackawanna County on October 8, 2014. The Court of Common Pleas of

Lackawanna County, the Honorable John Braxton, entered an Order as follows:

> "ORDER
>
> AND NOW, this 21st day of October 2014, upon consideration of Plaintiff's Motion for Injunctive Relief/Declaratory Judgment, the applicable law, and argument before this court on the matter, it is hereby ORDERED AND DECREED that this court will render no decision on the matter.
>
> This court finds that it is not the proper venue for this matter, since the case is not in the proper posture for a decision to be rendered on the Plaintiff's requested forms of relief."
>
> BY THE COURT:
>
> Braxton ,S.J.
> John Braxton"

26. On October 31, 2014, the Scott Township Supervisors and Scott Township Code Enforcement Officer Carl S. Ferraro issued another Notice of Violation alleging Plaintiff's property contained a burial ground and that Plaintiff was in violation of Scott Township Ordinance 12-12-20-001. The Notice is attached to this Complaint as Exhibit "B" and incorporated herein by reference.

27. This second Notice informed Plaintiff she was in violation of the Ordinance in part because the purported burial ground on her land as not open and accessible to the public.

28. As a consequence of Scott Township's Enforcement Notice of October 31, 2014, Plaintiff filed

a Petition for Contempt in the Court of Common Pleas of Lackawanna County. Following a hearing before the Court of Common Pleas, the Honorable Terrance Nealon presiding denied the Petition for Contempt and entered a Memorandum and Order which essentially lifted the Stay that had previously been entered on May 9, 2013. The Court of Common Pleas of Lackawanna County has not addressed the Plaintiff's claim for Declaratory Relief.

V. CAUSES OF ACTION

COUNT I

CLAIM AGAINST DEFENDANT SCOTT TOWNSHIP FOR A VIOLATION OF PLAINTIFF'S FOURTH AMENDMENT RIGHTS UNDER 42 U.S.C. SECTION 1983

29. Plaintiff, Rose Mary Knick, incorporates by reference the allegations of paragraphs 1 through 28 as though fully set forth herein.

30. Upon information and belief, Defendants Scott Township and Scott Township Board of Supervisors maintain a policy, practice, custom or procedure that its Code Enforcement Officer may effectuate warrantless entry onto the private property of citizens within Scott Township.

31. Scott Township's policy, custom, practice or procedure was the direct cause of the Scott Township's Code Enforcement Officer's action on April 10, 2013, consisting of his warrantless entry onto the private property of the Plaintiff, and as such resulted in the violation of Plaintiff's rights under the Fourth Amendment of the United States Constitution subjecting it to liability under 42 U.S.C. Section 1983.

32. Plaintiff has suffered damages as a result of Defendant Scott Township's unlawful policy, custom, practice or procedure.

WHEREFORE, Plaintiff, Rose Mary Knick, respectfully requests that this Court enter a judgment in her favor:

(a) Awarding her economic damages;

(b) Awarding her compensatory damages;

(c) Awarding her attorneys' fees and costs of this action;

(d) Awarding her punitive damages; and

(e) Granting such other relief as the Court deems necessary and appropriate.

COUNT II

CLAIM AGAINST DEFENDANT SCOTT TOWNSHIP FOR VIOLATION OF PLAINTIFF'S CONSTITUTIONALLY PROTECTED RIGHTS PURSUANT TO THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS, UNDER 42 U.S.C. SECTION 1983

33. Plaintiff incorporates by reference the allegations of paragraph 1 through 32 as though fully set forth herein.

34. The provisions of the Ordinance require that "all cemeteries within the Township shall be kept open and accessible to the general public during day light hours."

35. The Ordinance defines "cemeteries" to include burial grounds that are "contained on private . . . property."

36. The Ordinance requires private property owners to allow the general public to enter, traverse, and occupy their private land, without compensation, every day of the year. As such, on its face, the Ordinance causes an unconstitutional physical invasion and taking of private property.

37. The Ordinance also causes an unconstitutional physical taking on its face in authorizing the Township's "Code Enforcement Officer and/or his/her agents and representatives" to enter, traverse and occupy private property for the purpose of determining the "existence" of any cemetery, without any provision of compensation to the effected owners.

38. The Ordinance gives the Township an easement across all private land within its jurisdiction which it can utilize at any time on the basis that it is looking for the existence of cemeteries.

39. On its face, the Ordinance provision allowing Township officials to invade and access private land to look for cemeteries eviscerates property owners' fundamental right to exclude others. The provision therefore takes private property in violation of the Takings Clause.

40. Moreover, on its face, the Ordinance gives Township agents a right of entry on private land without cause. It therefore *seizes* real property interests, and/or authorizes a *search* of such lands, in violation of the Fourth Amendment.

41. The Township has applied its Ordinance to Plaintiff's property by physically entering the property and by sending Notices of Violation which declare her property to be subject to the Ordinance, and which further state that she is in violation of the Ordinance in part because her property is not open to the general public.

42. As applied to Plaintiff, the Ordinance effects an uncompensated physical taking of her property by requiring Plaintiff to open her private property to the public, on pain of civil fines and penalties.

43. The Plaintiff has suffered damages as a direct result of the enactment by Scott Township of Ordinance No. 12-12-20-001.

WHEREFORE, Plaintiff, Rose Mary Knick, respectfully requests that this Court enter a judgment in her favor:

(a) Awarding her economic damages;

(b) Awarding her compensatory damages;

(c) Awarding her punitive damages;

(d) Awarding her attorneys' fees and costs of this action; and

(e) Granting such other relief as the Court deems necessary and appropriate.

COUNT III

CLAIM FOR RELIEF PURSUANT TO THE DECLARATORY JUDGMENT ACT DECLARING SCOTT TOWNSHIP ORDINANCE 12-12-20-001 UNCONSTITUTIONAL AND FOR A TEMPORARY RESTRAINING ORDER, AS WELL AS PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AGAINST SCOTT TOWNSHIP

44. Plaintiff incorporates by reference the allegations of paragraph 1 through 43 as though fully set forth herein.

45. Plaintiff, Rose Mary Knick, is entitled to a Temporary Restraining Order, as well as a Preliminary and Permanent Injunction. Defendant, Scott Township is acting and threatening to act under color of state law to enforce the unconstitutional Ordinance 12-12-20-001. Plaintiff will suffer irreparable injury and will continue to suffer real and immediate threat of irreparable injury as a result of the existence, operation, enforcement and threat of enforcement of the challenged Ordinance. Plaintiff has no adequate or speedy remedy at law.

46. Plaintiff, Rose Mary Knick, as owner of the premises, as described herein, has received from Defendant, Scott Township, Notice of Violation dated April 11, 2013 and October 31, 2014, and consequently her interest in these proceedings is direct, substantial and present and the Enforcement Action undertaken by Scott Township reveals an actual controversy related to the invasion of Plaintiff's constitutionally protected property rights.

47. Plaintiff, Rose Mary Knick, requests a Declaration of Rights with respect to the controversy. Without such a Declaration, Plaintiff, Rose Mary Knick, will be uncertain of her rights and responsibilities under the law.

48. Plaintiff asserts that Scott Township Ordinance No. 12-12-20-001 violates the Constitution of the United States of America, the Constitution of the Commonwealth of Pennsylvania and that said Ordinance is illegal, unconstitutional and without force of law in the following respects. Among others:

(a) The public access provisions unconstitutionally takes Plaintiff's property on their face and as-applied.

(b) The provisions of Section 6 of the Ordinance attempting to grant to the Township rights to enter and access private property violates the Takings Clause and the Fourth Amendment of the United States Constitution on their face.

49. The harm to Plaintiff as a result of Defendant's attempt to enforce an unconstitutional and void Ordinance is substantial.

50. Unless Defendant is enjoined or other relief is granted, Plaintiff will be deprived of her constitutionally protected property rights.

51. No harm or prejudice will result to Defendant if relief is granted.

52. Plaintiff has no adequate remedy at law.

53. Plaintiff's right to relief is clear.

WHEREFORE, Plaintiff respectfully requests the following additional relief:

(a) A Declaratory Judgment holding that Scott Township Ordinance 12-12-20-001 is unconstitutional;

(b) A Temporary Restraining Order, Preliminary Injunction and Permanent Injunction prohibiting Defendant, Scott Township, from enforcing the challenged Ordinance;

(c) Awarding her economic damages;

(d) Awarding her compensatory damages;

(e) Awarding her punitive damages;

(f) Awarding her attorneys' fees and costs of this action; and

(g) Granting such other relief as the Court deems necessary and appropriate.

Respectfully submitted,

/s/Frank J. Bolock, Jr., Esquire
Frank J. Bolock, Jr., Esquire
Atty. I.D. No. 29983
212 Front Street,
Clarks Summit, PA 18411
Tel. (570) 585-5600\
Fax (570) 585-5601

Dated: 11/16/2015

Attorney for Plaintiff, Rose Mary Knick

Document 21 Filed 11/16/2015
United States District Court
for the Middle District of Pennsylvania

EXHIBIT A TO SECOND AMENDED COMPLAINT

SCOTT TOWNSHIP

An Historic Community Founded 1840

COMMONWEALTH OF PENNSYLVANIA

1038 MONTDALE RD. SCOTT TOWNSHIP, PA
18447 PHONE: 570-319-1296 • FAX: 570-319-1321

April 11, 2013

****NOTICE OF VIOLATION****

Rose Knick
49 Country Club Rd
Scott Township Pa 18433

Ms. Knick,

On April 10, 2013 an inspection was made of your property on Country Club Rd. based on information that there may be a cemetery on the property. Multiple grave markers/tombstones were found during this inspection. As a result, it has been determined that a "cemetery" as defined by ordinance 12-12-20-001 exists on your property.

This letter will serve as notice that you are in violation of the above referenced ordinance, Section # 4, which requires that all cemeteries be maintained and kept up by the owner of the property where it resides. "No owner shall allow grass, weeds or trees to accumulate upon same to the extent that any grave marker is obstructed and shall otherwise keep same free of debris and refuse." The stones located on your property were found to be obscured by trees, dirt and weeds. Others have been buried or covered with dirt and leaves.

It has also been determined that you are in violation of section # 5 of the ordinance which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours. No owner or personal shall unreasonably restrict access to the general public nor shall any fee for access be charged.

Within 30 days from that date of this notice, you are directed to remove any weeds, trees or debris from the cemetery that may be obscuring the graves or markers. The stones that are in the cemetery should be made visible and restored as much as possible, in that they should be stood up to their original position or at the very least laid on the grave face up so that the graves can be identified.

You are also directed to make access to the cemetery available to the public during daylight hours as required by the ordinance.

A second inspection of the property will be conducted in 31 (THIRTY ONE) days from the date of this letter. If the cemetery has not been cleaned, the Township will enter upon the property and provide for the removal to be done by employees of the Township or persons hired for such purpose at the Township's expense. All costs of removal and clean up shall be assessed against the you as the property owner and thereafter shall be collected by the Township pursuant to 53 P.S. §68302(b) of the Second Class Township Code.

In addition, failure to comply with either of these requirements will result in a civil enforcement action being brought by the Township. Upon being found liable in a civil enforcement proceeding before a District Justice or Magisterial District Justice, You shall pay a fine and/or penalty of not less than Three Hundred ($300.00) Dollars nor more than Six Hundred ($600.00) Dollars per violation, plus all court costs, including reasonable attorney's fees incurred by the Township in the enforcement of this Ordinance. Each day that the violation exists shall constitute a separate offense.

As always our goal is compliance with the Ordinances of the Township rather that punishment, as such I look forward to your cooperation in this matter. If you have any questions feel free to contact me at the Township Office at 570.319.1296 ext 6 Monday-Friday.

Thank You

s/Carl S. Ferraro
Carl S. Ferraro
Code Enforcement Officer

Sent via certified and first class mail

Cc: File
Supervisors
Solicitor

Document 21 Filed 11/16/2015
United States District Court
for the Middle District of Pennsylvania

EXHIBIT B TO SECOND AMENDED COMPLAINT

SCOTT TOWNSHIP

An Historic Community Founded 1840

COMMONWEALTH OF PENNSYLVANIA

1038 MONTDALE RD. SCOTT TOWNSHIP, PA
18447 PHONE: 570-319-1296 • FAX: 570-319-1321

October 31, 2014

****NOTICE OF VIOLATION****

Rose Knick
49 Country Club Rd
Scott Township PA 18433

Ms. Knick,

Based on information received from eyewitness accounts it has been determined that a "cemetery" as defined by ordinance 12-12-20-001 exists on your property.

This letter will serve as notice that you are in violation of the above referenced ordinance, Section # 4, which requires that all cemeteries be maintained and kept up by the owner of the property where it resides. "No owner shall allow grass, weeds or trees to accumulate upon same to the extent that any grave marker is obstructed and shall otherwise keep same free of debris and refuse.

It has also been determined that you are in violation of section # 5 of the ordinance which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours. No owner or personal shall unreasonably restrict access to the general public nor shall any fee for access be charged.

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In addition, failure to comply with either of these requirements will result in a civil enforcement action being brought by the Township. Upon being found liable in a civil enforcement proceeding before a District Justice or Magisterial District Justice, You shall pay a fine and/or penalty of not less that Three Hundred ($300.00) Dollars nor more than Six Hundred ($600.00) Dollars per violation, plus all court costs, including reasonable attorney's fees incurred by the Township in the enforcement of this Ordinance. Each day that the violation exists shall constitute a separate offense.

As always our goal is compliance with the Ordinances of the Township rather than punishment, as such I look forward to your cooperation in this matter. If you have any questions feel free to contact me at the Township Office at 570.319.1296 ext 6 Monday-Friday.

Thank You

s/Carl S. Ferraro
Carl S. Ferraro
Code Enforcement Officer

Personal Service

Cc: File
Supervisors
Solicitor

* * * * *

Transcript of Hearing August 31, 2016

Knick v. Township of Scott

United States District Court

for the Middle District of Pennsylvania

[2]

MR. KOZLOWSKI: Thank you, Your Honor. Judge, as the Court is probably aware at this point, this case has a lengthy procedure history. Briefly I will walk through how we got to where we are at today. I represent Scott Township. The complaint was originally filed in November 2014. Motion to dismiss was filed to that original complaint. In response an amended complaint was filed February 15, and motion to dismiss was filed as to that first amended complaint. This Court issued an order and a – I would say a well reasoned and thorough opinion in October of 2015 granting the motion the dismiss in its entirety.

There were five counts contained in the amended complaint, three of which were dismissed with prejudice, two which were dismissed without, one of which was a request for declaratory relief. In accordance with the Court's order an amended complaint – excuse me – a second amended complaint was filed in November – November 16th, 2015. In response we again – Scott Township filed a motion to dismiss in November that's been fully briefed at this point. That's what brings us here today, and I will briefly address – and I am sure Mr. Breemer will bring this up himself.

In our reply brief – follow the filing of the defendant reply brief, the plaintiff sought leave to file a sur reply. That request was ultimately denied, and the motion is pending at this point. It's the plaintiff that's actually **[3]** requested oral argument today. So briefly, Your Honor, the entire lawsuit factually boils down to the passage – as the court is already aware – the passage of the ordinance in Scott Township, Pennsylvania.

THE COURT: How do you know it's a burial ground? That's one missing piece of information.

MR. KOZLOWSKI: Sure. And it takes us slightly outside of the pleadings. I am happy to address it if the Court is interested.

THE COURT: It does. But there's some indication that there was an – a letter from council indicating work on the title and so forth. So I don't know that it is outside of the pleading. If you don't want to answer you don't have to.

MR. KOZLOWSKI: I am happy to answer. I want to make sure I am not taking us into a realm where we start to get into facts that are outside of pleadings, but essentially it – it depends on who you ask. But the neighbors of the Knicks are the Veils. The Veils have claimed that their ancestors are specifically buried on that property. There have been title searches that have been done as far as I am aware, none by Scott Township. There's also some indication based upon media reports, Scranton Times newspaper article, for example, that claims that the Veils have actually been on the Knick property and have seen Veil family tombstones on that property.

Additionally, you can do a simple internet search for **[4]** Pennsylvania cemeteries that are – sort of been lost in time, and one of which comes up is the Veil family plot located in Scott Township on the 90 acres owned by the Knick family. That forms the basis for why the township believes that there is or at the time believed there was a cemetery on that property.

You also have a former defendant no longer a defendant in this case, Carl Ferraro, who is the Scott Township code enforcement officer. Mr. Ferraro has been on the property. He was the one that issued the citation to Ms. Knick for not maintaining the cemetery plot essentially on the Knick family property.

So that forms the basis for why Scott Township believes that the Knick property has a cemetery on it. Now, I would also point out, Your Honor, in drafting the Scott Township ordinance, it is not specific to the Knick family. I think there's a big distinction there. While the Knicks have certainly been the subject of citations issued under the ordinance, it was not an ordinance directly – directed at the Knick family only. Had the Scott Township council passed a sort of ordinance that our code enforcement officer can go on the Knick family property at any time to look for a cemetery, we'd have a much different case on our hands. The ordinance is written to apply to all property owners in Scott Township across the board if there's a – if there's a cemetery –

THE COURT: You have a lot of suspected cemeteries in **[5]** Scott Township?

MR. KOZLOWSKI: Scott Township is a very big town. It goes back several hundred years in terms of families and burial plots. So while these may not be message sprawling cemeteries, you will have small plots that families have maintained for years. So in keeping with the township's interest in maintaining cemetery plots and in keeping – we pointed this out in our moving papers in both motions. In keeping with the Pennsylvania corporate township powers act, that's 1933 Act 69, it specifically permits a township to pass and implement ordinances dealing with the maintenance of cemeteries on public and private lands.

Getting us back to where we are at today, the motion dismiss, when the second amended complaint was filed, it limited the allegations against Scott Township. It knocked out Carl Ferraro as a party. So the only defendant now is Scott Township itself. Count one, for example, seeks damages for Fourth Amendment search. The Court has already addressed this issue before in its prior memo. The only allegation – really the only thing that's changed as far as count one is concerned was a demand for punitive damages. As a municipality even if there were some sort of constitutional finding, punitive damages are not available.

So as a preliminary matter, even if the Court is not inclined at this point to dismiss again with prejudice, count **[6]** one, two and three, the punitive damage claims have to go. They can't exist. That's Newport versus Fact Concerts, Inc, and several cases that stemmed from that U.S. Supreme Court case from 1981. Count two is sort of a hodgepodge of different alleged constitutional violations, fourth, fifth and 14th Amendment allegations.

Now, one of the issues that appears to be raised again in the second amended complaint that again has already been addressed by this Court in its memo is whether or not the ordinance itself is constitutional whether it's as applied or on its face. The Court has already held that the ordinance survives rational basis review. That's coming directly out of Your Honor's opinion. I believe that is now law of the case. So to make these facial challenges to the statute, I believe those allegations have to fail. The count – third count rather, again seeks declaratory judgment, a temporary restraining order, a preliminary injunction and a permanent injunction, all of which I would argue, that the defense would argue, fails because the elements of the likelihood of success has not been met with respect to count one and count two.

These types of declaratory equitable relief requests can only survive if there's some sort of plausible claim or possibility of success on the merits of the claim in order to sustain that type of relief. Really, the last thing I would add, Your Honor – we have been down this road before. The **[7]** Court issued a very thorough opinion on this topic. Nothing has changed in terms of the allegations and facts and the second amended complaint as compared to the first.

In fact, count one of the amended complaint is literally a cut and paste from count one of the first amended complaint which the Court already dismissed with prejudice. Now, I understand there's an argument that was made that is being – to preserve some sort of appellate issue. That's fine. But just to point out based solely on the pleadings and the facts that are alleged in the second amended complaint the plaintiff again failed to make a plausible Fifth Amendment takings or a 14th Amendment due process action out against Scott Township, and the entire second amended complaint at this point should be dismissed with prejudice.

THE COURT: What about the taking clause?

MR. KOZLOWSKI: Your Honor, the plaintiff has argued in its brief in opposition that the defendant essentially blew past the takings issue and failed to really address the allegation that there was some sort of taking on the property. I would point the Court to not only our in brief in opposition but also the reply brief filed by defendants. And we argued from when the original complaint came in there was a motion to dismiss filed there as all the way to now the second amended complaint that this is not a taking, that this is an ordinance that's been enacted to promote health and safety and welfare of **[8]** the residents of Scott Township. They have a vested interest in preserving family burial plots, cemeteries within the township. And passing this ordinance is no different as we have mentioned before to ordinances that have been passed by other townships that required restrictions on use of property. And there are specific cases not only in the middle district but also that have fallen – or fall into the Third Circuit and Supreme Court that limitation on economic uses of property does not constitute a taking.

If Scott Township had gone in and said we are physically seizing this property and we are making it a public use, then I would agree with plaintiff's interpretation as to how the property is being designated from a private to a now public use parcel. What the ordinance does – and again it's in keeping –

THE COURT: What about the public access provision of the ordinance?

MR. KOZLOWSKI: Again, it's not taking the property. It's – I think what gets sort of lost in translation here is the term of the – use of the term public. Scott Township isn't taking this property and turning it into say a park or turning it into some sort of piece of land that's being used for the public good. All the ordinance is requiring is –

THE COURT: Why are you allowing public access?

MR. KOZLOWSKI: Because it is a cemetery within the **[9]** township – township boundary. There needs – to the extent – well, presume that what I said earlier is true that there is, in fact, a family – Veil family plot on the property. The property is now maintained by the Knicks. The Veils theoretically have no right to access that family burial plot like any other family wouldn't have access to –

THE COURT: But the ordinance isn't limited to them. I can go out there and walk around. Where am I walking, by the way? All 90 acres?

MR. KOZLOWSKI: It's within the restriction of what the original cemetery parameters would be and the right of access from a public road or a public access point –

THE COURT: Has that been defined?

MR. KOZLOWSKI: Specifically by the statute, no, but it would be on a case-by-case scenario because you wouldn't have – you wouldn't always have clearcut access in every single situation. Just because the Knick family property sits on 90 acres and happens to be a cemetery at some point on that, the access point from a public road to that cemetery is going to be defined differently than a family plot that may appear on a cemetery that's sits on only 30 acres, whether it sits on one acre for that matter. Going from the road ten feet into a property and then ending up on a – ending up on a cemetery was the general intention of the ordinance. There needs to be public – there needs to be a public access point in order to **[10]** get to the cemetery grounds. That's the purpose of the statute.

That's the same reason that the Pennsylvania passed act 1969 to give townships the ability to maintain, control and permit access to these public – to permit access to these family cemetery plots.

THE COURT: Has there been a definition of the location of the cemetery on the 90 acres?

MR. KOZLOWSKI: Specifically defining in terms of say a survey, what – where pins might be?

THE COURT: You tell me.

MR. KOZLOWSKI: I don't know that it's been clearly defined to say it fits within a half acre or that it sits within a one hundred by one hundred square piece of property. The ordinance – the ordinance gives the code enforcement officer with suspicion the right to go on to this – on to this piece of property to identify whether or not a cemetery does exist there and based on that the code enforcement officer has the right to require under the ordinance that private piece of property be maintained and kept open to the public in order for family or public access.

THE COURT: All right.

MR. KOZLOWSKI: And I agree, Your Honor, the ordinance may not specifically have a provision in there that says once it's been discovered that there's a cemetery the **[11]** following must happen, there must be a – there must be a survey done, clearly define what the limitations of the cemetery parcel are. But I think that's – that's something that because it happens on a case-by-case basis it's not easily defined within the ordinance.

THE COURT: Okay. Is that it?

MR. KOZLOWSKI: That's it. Thank you.

MR. BREEMER: Good morning, Your Honor. I'm going to come up here if it's all right.

THE COURT: Sure.

MR. BREEMER: I am here this morning with my co-counsel, Mr. Bollock and Rose Mary Knick and appreciate the opportunity to have this hearing. This ordinance causes about a clear taking as you have under settled constitutional precedent that forbids the government from opening up private property to public access, trail or easement, whatever you want to call it, thereby destroying the right to exclude the owner's traditional and fundamentally protected right to control or deny or permit access to his or her own private property.

And in this case, you have an ordinance that allows the government and members of the public, not just family, but anyone to enter and cross Ms. Knick's property to view stones, destroying her privacy, her quiet enjoyment, subjecting her to potential liability, safety issues. And beyond all that, the law just simply doesn't allow this. This is a taking. It's a **[12]** physical invasion of private property. This is a Nolan case, Keyser Aetna case that's already been decided. The Supreme Court held when the government authorizes a right of way or the public it is taking the private properties – fundamental property rights and that requires compensation. In this case, on the facial claim because that ordinance on its face requires public access to all property, as my colleague noted to all property within the town, it simply has to be struck down, enjoined and declared to be unconstitutional and the town can start again.

As far as the inspection provision, I heard my colleague say that it allows the code inspector to go on with suspicion. The ordinance doesn't say that. What the ordinance says is that code enforcement can go on any property in the town any time to search for the existence and location of cemeteries. There's no geographic limitation, going next to someone house, maybe they buried in the backyard a while back. No limitation on that, no notice, no restrictions, simply a pass to enter into every property on the township. That goes beyond anything the Fourth Amendment allow and goes beyond – you start to get into takings again where you're allowing an easement on private property for a particular purpose, but the purpose doesn't matter when it's a physical invasion. It doesn't matter. This is the Lorretto case. Once you invade private property for any good purpose, it's still a taking **[13]** because you're destroying an owner's fundamental right to exclude the public. You can't have private property without the right to keep it private. What has happened here is that's being destroyed. The town has a – suggested this old Pennsylvania statute authorizes its actions, and it does not.

The statute has never been interpreted or applied to require somebody to open up a small family cemetery that's always been private to the public. It's never been interpreted that way. And if it was interpreted that way for the first time then that would be a taking, but it doesn't have to be interpreted that way. What that statute says it simply gives the town enough authority to require the clean up of public cemeteries that are already open to the public to require them be kept up, and while that is happening they shall remain open to the public that's – the word remain is important because that suggests that the cemetery is already public.

In this case what the town has said through the notices of violations to Ms. Knick and it made clear in its briefing here is that it requires small family plots that haven't been public like Ms. Knick to now be made public somehow with people walking across her property somewhere for – staying all daylight hours. There's no limitations again on this. This is a – this is a very – it's a very extensive right of permission for the public to go in for Mrs. Knick who lives alone on her property. And in this day and age it's not **[14]** a – it's not something want to lose the right to control your property, and you want to maintain that. The Constitution allows to you do that. What I suggest is that the motion to dismiss be denied. We will quickly follow up on the facial claims with the motion for summary judgment on these spacial claims. This isn't intensive factual issue because the text of the ordinance is clear on its face that it authorizes public access, and I think we can dispose of this very quickly. And the right thing to do is strike down the ordinance. It's unconstitutional.

THE COURT: The – in terms of the fact there's – they say there are another family buried there and your clients had this for over 70 years.

MR. BREEMER: Since the 70s, I believe.

THE COURT: You did a title search. There's no evidence of any kind of – did this Veil family – I mean, I know none of these are in the record, but I'm – is it Veil?

MR. BREEMER: Veil.

THE COURT: Did they own the adjoining land?

MR. BREEMER: They are neighbors.

THE COURT: Did they ever own this land in the history of the search?

MR. BREEMER: I do not know. I do not know. No, and I don't know all of those facts. I would say this, Your Honor. It doesn't –

[15] THE COURT: It doesn't matter, right. I agree with that.

MR. BREEMER: It's interesting.

THE COURT: I quite agree with that. Anything else?

MR. BREEMER: If you have no questions I am happy –

THE COURT: I have nothing. Thank you.

MR. BREEMER: Thank you very much.

MR. KOZLOWSKI: Brief reply, Your Honor.

THE COURT: Very.

MR. KOZLOWSKI: The Pennsylvania – the Pennsylvania statute that permits the townships to enact this type of legislation it – there's a difference of interpretation. And I understand that in terms what the word shall means in that ordinance, cemetery shall remain open to the public under the regulation and control. Plaintiff's interpretation is that if this the cemetery is open today it must remain open for perpetuity and the converse is true. But when you read the entire ordinance – and again this is the Pennsylvania ordinance not just the –

THE COURT: Yeah, I understand.

MR. KOZLOWSKI: Not just the smaller township ordinance. When a cemetery or burial ground is abandoned or being neglected the board of supervisors may give notice to the owner directing the removal of weeds, refuse and debris from the cemetery within 30 days. It presupposes there's going to **[16]** be a cemetery or multiple cemeteries that are going to be abandoned, neglected.

THE COURT: Yeah, you can satisfy your version of the statute, couldn't you, by simply requiring clean-up, maintenance of the plot without providing public access?

MR. KOZLOWSKI: Well, it still gets into the same issue as to how a family member – for example, how would a Veil family member get on to that?

THE COURT: What's in the Pennsylvania statute that requires that?

MR. KOZLOWSKI: I don't know the Pennsylvania statute necessarily goes that far, but I would say that the ordinance itself still provides – or still keeps within the confines of the health, safety and welfare idea that Scott Township has a vested interest in trying to protect those interests of its residents that family members should be able to go on family burial plots even if they sit on somebody else's land. In closing, I will point to the case that's been cited by not only plaintiff but also addressed by the defense, that's Lorretto versus the Teleprompter Manhattan C. A. T.

E. Corp. That's a Supreme Court case from 1982. It's addressed at page 12 in defendant's reply brief.

Plaintiff cites it for the proposition that regulations authorizing physical invasion of property are per se unconstitutional. Respectfully, the defense disagrees with **[17]** that. And the holding goes further. Easement of passage, and that's the difference here. Easement of passage not being a permanent occupation of land was not considered a taking per se. What is happening here, and it brings me back to where I started. There's a difference in definition of the word public. What the ordinance requires is access. Essentially an easement for lack of a better legal term, for access from a public road or public walkway on to the property where there is a burial cite or a cemetery. It's not a taking of the property. The township is not absorbing it into its coffers as a piece of property now owned or maintained by the township itself.

It's requiring there must be access and that cemeteries must be cleaned up, and if they are not the Pennsylvania statute by extension of the ordinance permits the township to go in there and either a issue a citation or clean it up and provide the owner with the costs of that clean-up.

THE COURT: I understand the clean-up. But you're doing more than that, and you're saying you got to provide an easement but it's not a taking. But Mrs. Knick has no right to exclude people from that so-called easement. Isn't that true?

MR. KOZLOWSKI: I don't know that's necessarily true.

THE COURT: She can stop people from –

MR. KOZLOWSKI: The cemetery does not become, say, a public park where anyone can go on there.

[18] THE COURT: What does it become?

MR. KOZLOWSKI: I think you still have – you still have trespass issues. You still have a right of access issue. If my family does not have a tombstone or burial plot on that particular cemetery I would argue I would have no right to be there.

THE COURT: But your ordinance doesn't say that. Your ordinance says it's public access.

MR. KOZLOWSKI: There must be a public access point. I agree that's what the ordinance says.

THE COURT: That's anybody. Somebody can come from New Jersey and has nothing to do with the property in Scott Township and come on there and say, oh, let's look at the tombstone, isn't that interesting.

MR. KOZLOWSKI: Taking a tour of the local cemeteries. I agree the ordinance does not limit who specifically should be permitted on to that property. Again –

THE COURT: I don't know that it could by the way.

MR. KOZLOWSKI: Well, it's not the government's property to do with it as it wishes. It's still property and still – it's still the property of and maintained by the owner of the property. Scott Township is not coming in and taking Ms. Knick's property from her. It's requiring there be access to a public – simply requiring access to a cemetery plot.

THE COURT: Well, I understand that. The question **[19]** is, is that access or that easement a taking and should she be compensated for it.

MR. KOZLOWSKI: I think the Lorretto case deals with that where it says that the easement of passage is not permitted occupation of land and it's not considered a taking per se.

THE COURT: What were the facts in Lorretto?

MR. KOZLOWSKI: Your Honor, I don't have that answer.

THE COURT: Okay. It might be important. I don't know what they were.

MR. BREEMER: Would you like me to address it, Your Honor?

THE COURT: Okay.

MR. BREEMER: In Lorretto the city of New York City authorized a cable company by statute to place a cable box on Mrs. Lorretto's building without her permission and without compensation, and the Supreme Court held that that entry, that placement of the object was a physical taking because it physically occupied her property. Now since that time, of course, in subsequent cases including Keyser Aetna and Nolan which were public access cases the Court made clear that a public – that an easement and a public access is considered a physical occupation under the Lorretto rubric because you are allowing people, not a box, but people.

THE COURT: You agree with that?

[20] MR. KOZLOWSKI: I would – Lorretto has not been overturned. I would again say this is not –

this is not the government coming in and requiring or taking the property. It's simply enforcing the Pennsylvania statute through its own local ordinance that requires access to a cemetery burial plot.

THE COURT: Okay. Thank you. All right, thanks, everybody. You will hear from me soon. Thank you. I appreciate it. We're adjourned.

MR. BREEMER: Thank you.

Document 39-1 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

Filed 5/7/2013

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Attorney for Rose Mary Knick

ROSE MARY KNICK 49 COUNTRY CLUB ROAD SCOTT TOWNSHIP, PA 18433	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
vs.	ACTION SEEKING DECLARATORY JUDGMENT and INJUNCTIVE RELIEF
SCOTT TOWNSHIP 1038 MONTDALE ROAD SCOTT TOWNSHIP, PA 18447	2013-CV-2309

NOTICE

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are

warned that if you fail to do so the case may proceed without you and a judgment may be entered against you for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

North Penn Legal
Services
507 Linden Street,
Suite 300
Scranton, PA 18503
Phone: (570) 342-0184

Pa. Lawyer Referral
Service
P.O. Box 1086
100 South Street,
Harrisburg, PA 17108
PA residents phone
1-800-692-7375; out of
state Residents phone
1-717-238-6715

Document 39-1 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

Filed 5/7/2013

FRANK J. BOLOCK, JR., ESQ.
Atty. I.D. 29983
212 Front Street
Clarks Summit, PA 18411
Tel. (570) 585-5600
Fax (570) 585-5601
Attorney for Rose Mary Knick

ROSE MARY KNICK 49 COUNTRY CLUB ROAD SCOTT TOWNSHIP, PA 18433 Plaintiff vs. SCOTT TOWNSHIP 1038 MONTDALE ROAD SCOTT TOWNSHIP, PA 18447 Defendant	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY ACTION SEEKING DECLARATORY JUDGMENT and INJUNCTIVE RELIEF 2013-CV-2309

COMPLAINT SEEKING DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

AND NOW, comes Plaintiff, Rose Mary Knick, by and through Attorney Frank J. Bolock, Jr., who avers as follows:

1. Plaintiff, Rose Mary Knick, is an adult, competent person, resident and taxpayer of Scott Township, Lackawanna County, Commonwealth of Pennsylvania with an address at 49 Country Club Road, Scott Township, PA 18433.

2. Defendant, Scott Township, is a political sub-division of the Commonwealth of Pennsylvania organized and existing in accordance with the laws of Pennsylvania with a designation as a Township of the Second Class. Defendant, Scott Township's principal office is located at 1038 Montdale Road, Scott Township, Lackawanna County, Commonwealth of Pennsylvania.

3. Plaintiff, Rose Mary Knick, is the owner of certain real estate located within Scott Township as more particularly described in the Deed attached hereto as Exhibit "A" (hereinafter "the Premises"). The Premises is comprised of two parcels intersected by Country Club Road. Parcel one is a 91 acre parcel (more or less) utilized historically as a private working farm.

4. The Premises has been continuously owned and occupied by Rose Mary Knick and/or members of her family dating back from 1970 and continuing up through the present time. The Premises has been utilized over the years as a cultivated farmland, grazing area for horses, cattle and other farm animals.

5. In September 2008, apparently, in response to a citizen inquiry regarding an alleged existence of a burial ground on the Premises, the Scott Township Supervisors and Township Solicitor discussed the issue of the alleged burial ground at several public meetings.

6. In 2008 and early 2009 Plaintiff, Rose Mary Knick, individually and through her then counsel, Attorney Robert Cecchini, made a Right To Know request of the Scott Township Supervisors as to the particulars regarding the suggestion that a burial ground was situate on her property. Rose Mary Knick, individually and through her counsel, advised the Scott Township Supervisors that there was no designation in the chain of title regarding the Premises regarding the existence of a burial ground or cemetery on the Premises. Further, Plaintiff and her counsel advised Scott Township that there was no physical evidence of the existence of a burial ground or cemetery on the Premises.

7. In response to Plaintiff's Right To Know request for the Scott Township Supervisors provided Plaintiff, Rose Mary Knick and her counsel with some written statements of other citizens indicating their belief that a burial ground existed on the Premises.

8. In correspondence dated October 23, 2008 Plaintiff, Rose Mark Knick through her attorney, Robert Cecchini, provided Scott Township through their Solicitor with correspondence confirming that in fact the Premises had no designated burial ground, grave, grave yard or cemetery and further that his review of the chain of title and other documentation confirmed that there had never been any designation, registration or documentation establishing the existence of a cemetery, burial ground or grave yard on the Premises. A copy of Attorney Cecchini's correspondence of October 23, 2008 is attached as Exhibit "B" and is incorporated herein by reference.

9. The Scott Township Board of Supervisors took no further action with regard to the issue of the

cemetery, burial ground or grave yard on Plaintiff's Premises until October 2012 at which time the Scott Township Board of Supervisors enacted an Ordinance, specifically an Ordinance #12-10-18-001. A copy of the aforementioned Ordinance is attached hereto as Exhibit "C" and incorporated herein by reference. Subsequent to the enactment of the aforesaid Ordinance the Township Supervisors took no action to enforce said Ordinance with regard to the Premises of the Plaintiff.

10. At all times relevant hereto the Premises has been posted at regular intervals, "No Trespassing." The Premises is bounded by stonewalls, fences and other boundary markers.

11. In December of 2012 the Scott Township Board of Supervisors enacted an Ordinance 12-12-20-001 dealing with the issue of the operation and maintenance of cemeteries and burial places. The December 2012 Ordinance repealed the October 2012 Ordinance in its entirety. A copy of Ordinance No. 12-12-20-001, is attached hereto as Exhibit "D". The Plaintiff seeks Declaratory and Injunctive Relief with respect to the substantive effects of this Ordinance on her Constitutionally protected property and due process rights.

12. Apparently, the Scott Township Code and Enforcement Officer, Mr. Carl S. Ferraro, without benefit of permission or an administrative warrant conducted an inspection of the Premises. As a consequence of the illegal inspection of the Premises Scott Township through its Code Official directed a Notice of Violation dated April 11, 2013 to Plaintiff. A copy of the Notice of Violation is attached as Exhibit "E" and incorporated herein by reference.

13. On April 19, 2013 Plaintiff hand delivered and had time stamped a Right To Know request to Defendant, Scott Township, requesting "a copy of the inspection referred to in the Notice of Violation dated April 13, 2013 including but not limited to any report, document, photograph, maps." A copy of the Right To Know request is attached hereto as Exhibit "F."

14. By correspondence dated April 26, 2013, Scott Township provided an untimely response to Plaintiff's April 19, 2013 Right To Know request in which they claim an additional 30 days for purposes of legal review. A copy of the Township response is attached hereto as Exhibit "G."

COUNT I.

DELARATORY RELIEF

15. The averments set forth in Paragraphs 1 through 14 are incorporated herein as referenced.

16. Plaintiff, Rose Mary Knick, brings the within action pursuant to the provisions of Pennsylvania's Declaratory Judgment Act, specifically the provisions of 42 Pa. C.S.A. Sections 7533 which provides, in pertinent part,

> "any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status, or other legal relations are effected by statute, municipal ordinance, contract or franchise, may have determine any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder."

17. Plaintiff, as owner of the Premises as described herein has received from Defendant, Scott Township the Notice of Violation attached hereto as Exhibit "E" and consequently her interest in these proceedings is direct, substantial and present, and the enforcement action undertaken by Scott Township reveals an actual controversy related to the invasion of Plaintiff's Constitutionally protected property rights.

18. This action is brought for Declaration under said act for the purpose of determining an action and ripe case or controversy between the Parties.

19. Plaintiff asserts that Scott Township Ordinance No. 12-12-20-001 violates the Constitution of the United States of America, the Constitution of the Commonwealth of Pennsylvania and that said Ordinance is illegal, unconstitutional and without force of law in the following respects, among others:

a. The provisions of said Ordinance are vague, and;

b. The provisions of said Ordinance at Section 2 seeks to create a retroactive penal regulation regarding private property in violation of prohibition against expost fact laws, and;

c. The provisions of said Ordinance are unreasonable and have no rationale relation to the promotion of public health and safety and exist as an improper exercise of the Township Police power, and;

d. The provisions of Section 5 of the Ordinance and Section 2 of the Ordinance attempt to impose regulations on private property which require that, "all cemeteries within the

Township shall be kept open and accessible to the general public during day light hours. No owners or personnel shall unreasonably restrict access to the general public nor shall any fee for access be charged." These provisions exist as an effort at public taking without compensation, and;

e. The application of the Ordinance to Plaintiff's private property actually creates a nuisance by mandating public access to and across Plaintiff's private property which is otherwise not open to the public, and;

f. The Ordinance and Scott Township's effort at enforcement as pertains to the Plaintiff is arbitrary, unreasonable, bears no substantial relationship to the promotion of public health and safety, and;

g. The provisions of Section 6 of the Ordinance attempt to grant to the Township rights to access private property which are violative of the Fourth Amendment of the United States Constitution.

20. By reason of the above, Plaintiff seeks a Declaration that Scott Township Ordinance No. 12-12-20-001 is unconstitutional, void, ineffective, without force of law and that Plaintiff is not required to comply with its terms and provisions.

21. In conjunction with said Declarations, Plaintiff also seeks equitable relief in the form of Special Injunction, preliminarily following Hearing and permanently thereafter to preclude and enjoin Scott Township from enforcement of Ordinance No. 12-12-20-001.

22. The harm to Plaintiff as a result of Defendant's attempt to enforce an unconstitutional and void Ordinance is substantial.

23. Unless Defendant is enjoined or other relief is granted, Plaintiff will be deprived of her constitutionally protected property rights.

24. No harm or prejudice will result to Defendant if relief is granted.

25. Plaintiff has no adequate remedy at law.

26. Plaintiff's right to relief is clear.

27. In as much as constitutionality of the Ordinance is at issue, as required by Pennsylvania Rule of Civil Procedure 235, notice of these proceedings have been given to the Attorney General of the Commonwealth of Pennsylvania by registered mail dated May 7, 2013. A copy of the notice and mailing receipt is attached hereto and made a part hereof.

WHEREFORE, Plaintiff respectfully requests Your Honorable Court to (a) declare that Scott Township Ordinance 12-12-20-001 is unconstitutional, void, ineffective and without force; (b) declare that Scott Township is precluded from enforcing said Ordinance against Plaintiff and decree that the Notice of Violation dated April 11, 2013 is nullified; (c) grant equitable relief in the form of special injunction, preliminarily following hearing and permanently thereafter, to preclude and enjoin Scott Township from enforcing 12-12-20-001; (d) grant such other and appropriate relief including the award of attorneys' fees.

COUNT II

REQUEST FOR INJUNCTIVE RELIEF

28. The averments set forth in paragraphs 1 through 27 are incorporated herein as referenced.

29. Plaintiff, Rose Mary Knick, seeks equitable relief in the form of a Special Injunction, preliminarily following hearing and permanently thereafter to preclude and enjoin Scott Township in attempting to enforce or apply the provisions of Ordinance 12-12-20-001 to the Premises.

30. The harm to Plaintiff as a result of Defendant's illegal and unconstitutional Ordinance and their effort to apply the provisions of same to the Premises is substantial although difficult, if not impossible, to calculate.

31. Unless Defendant is enjoined or other relief if granted Plaintiff will be deprived of her property rights and her Constitutional Rights will be impaired.

32. No harm or prejudice will result to Defendant is relief is granted.

33. Plaintiff has no adequate remedy at law.

34. Plaintiff's right to relief is clear.

WHEREFORE, Plaintiff respectfully requests Your Honorable Court to grant equitable relief in the form of a Special Injunction, preliminarily following hearing and permanently thereafter, to preclude and enjoin Scott Township from enforcing Ordinance 12-12-20-001 to the Premises.

COUNT III

INJUNCTIVE RELIEF TO PREVENT SCOTT TOWNSHIP FROM ATTEMPTING TO ENFORCE ORDINANCE NO. 12-12-20-001 AS A CONSEQUENCE OF THEIR WARRANTLESS ENTRY ONTO PLAINTIFF'S PROPERTY

35. The averments set forth in paragraphs 1 through 34 are incorporated herein as referenced.

36. Scott Township through its code official directed Plaintiff a Notice of Violation dated April 11, 2013, a copy of which is attached hereto as Exhibit "E". The Notice of Violation indicates, "on April 10, 2013 and inspection was made of your property on Country Club Road based on information that there may be a cemetery on the property. Multiple grave markers, tombstones were found during the inspection. As a result, it has been determined that "a cemetery" as defined by Ordinance 12-12-20-0001 exists on your property."

37. The April 10, 2013 warrantless entry by Scott Townsihp onto Plaintiff's private property is violative of Plaintiff's constitutionally guaranteed right against unreasonable search and seizure.

38. The entry by the Scott Township Code Official onto the private property of Plaintiff, Rose Mary Knick, without an administrative warrant is violative of Plaintiff, Rose Mark Knick's, constitutionally protected Fourth Amendment prohibitions against unreasonable searches and seizures. The United States Supreme Court has consistently held that except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has

been authorized by a valid search warrant. *Cmara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

39. Plaintiff, Rose Mary Knick, seeks equitable relief in the form of Special Injunction, preliminary following hearing and permanently thereafter to preclude and enjoin Scott Township from pursuing its Notice of Violation and/or otherwise enforcing the provisions of the Ordinance 12-12-20-001 and that all evidence obtained on the basis of their warrantless entry onto private property of Rose Knick on April 10, 2013 be suppressed and barred.

40. The harm to Plaintiff as a result of Defendant's warrantless entry onto her private property is substantial.

41. Unless Defendant is enjoined and the alleged evidence obtained from their warrantless entry is oppressed Plaintiff will be deprived of her constitutionally protected right against reasonable searches and seizures.

42. No harm or prejudice will result to Defendant if relief is granted.

43. Plaintiff has no adequate remedy at law.

44. Plaintiff's right to relief is clear.

WHEREFORE, Plaintiff, Rose Mark Knick, respectfully requests Your Honorable Court to grant equitable relief in the form of a Special Injunction, preliminarily following hearing and permanently thereafter to preclude and enjoin Scott Township from enforcing Ordinance 12-12-20-001 on the basis of their unreasonable and warrantless entry onto Rose Mary's

Knick's private property on April 10, 2013 and such other relief the Court deems just and proper.

Respectfully submitted,

s/ Frank J. Bolock, Jr.
Frank J. Bolock, Jr., Esquire
Atty. I.D. No. 29983
212 Front Street
Clarks Summit, PA 18411
Tel. (570) 585-5600
Fax (570) 585-5601

Attorney for Plaintiff
Rose Mary Knick

VERIFICATION

I, Rose Mary Knick, verify that the facts set forth in the aforegoing Complaint Seeking Declaratory and Injunctive Relief are true and corrent to the best of my knowledge, information and belief.

I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904, relating to unsworn falsification to authorities.

Date: 5/7/13

s/ Rose Mary Knick
Rose Mary Knick

Document 39-1 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

EXHIBIT A TO COMPLAINT

EVIE RAFALKO McNULTY
LACKAWANNA COUNTY RECORDER OF DEEDS
Scranton Electric Building
507 Linden Street
Scranton, Pennsylvania 18503
(570) 963-6775

Instrument Number – **200808805** *Total Pages – 5
Recorded On 4/17/2008 At 9:32:35 AM
***Instrument Type** – DEED
Invoice **Number – 103168**
***Grantor** – KOSLAB, MARGARET
***Grantee** – KNICK, ROSE MARY
***Customer** – ANN MARIE HOWELLS
***FEES**

STATE WRIT TAX	$0.50
STATE JCS/ACCESS TO JUSTICE	$10.00
RECORDING FEES – RECORDER OF DEEDS	$13.50
AFFORDABLE HOUSING	$13.00
PARCEL CERTIFICATIONS	$12.00
COUNTY IMPROVEMENT FEE	$2.00
ROD IMPROVEMENT FEE	$3.00
TOTAL PAID	$54.00

This is a certification page

DO NOT DETACH

This page is now part
of this legal document.

RETURN DOCUMENT TO:
ANN MARIE HOWELLS
307 W. MARKET STRET
SUITE 1
SCRANTON, PA 18508-2783

(Seal of Recorder of Deeds)

WARRANTY DEED

From

Margaret Koslab, single

To

Rose Mary Knick, single

Commonwealth of Pennsylvania:

: SS.

County of Lackawanna :

Recorded on this ______ day of ________ A.D. 2008, in the Recorder's Office of said County in Deed Book ____________ Volume ____ Page _______.

Given under my hand and seal of the said Office, the date above written.

_____________________Recorder

ANNE MARIE HOWELLS, ESQUIRE
307 WEST MARKET STREET, SUITE #1
SCRANTON, PA 18508-2783
(570) 344-1088

LACKAWANNA
COUNTY
CERTIFIED
PROPERTY
IDENTIFICATION

MUNI: 73
PIN: 05102 010 023
USE: 5000 ASSESS
VAL: 17605
DATED 4/17/08 s/ JB
CLERK

LACKAWANNA
COUNTY
CERTIFIED
PROPERTY
IDENTIFICATION

MUNI: 73
PIN: 07101 020 002
USE: 2000 ASSESS
VAL: 428
DATED 4/17/08 s/ JB
CLERK

DEED

This Deed, made the 14th day of April, 2008, between *Margaret Koslab, single*, of Borough of Olyphant, County of Lackawanna and Commonwealth of Pennsylvania, herein called Grantor,

AND

Rose Mary Knick, single, of Borough of Jermyn, County of Lackawanna and Commonwealth of Pennsylvania, herein called Grantee.

Witnesseth, that the Grantor, in consideration of the sum of One Dollar ($1.00), the receipt of which is hereby acknowledged, does hereby grant and convey unto the said Grantee, her heirs and assigns,

PARCEL ONE: PIN NUMBER: **05102-010-023**

ALL the certain parcel, piece or plot of land situate, and being in the Township of Scott, County of Lackawanna, and State of Pennsylvania, more fully described and bounded as follows, to wit:

BEGINNING at a point in the center of Pennsylvania State Highway leading from Jermyn to Orvis Corner, said point being the common corner of lands of Semian Hubbard, Lucille Post and Nick Kostukovich; thence along line of Post, Neil Nafus, and Nick Kostukovich and along center of said highway North 4° West 483.8 feet to a point; thence along line of Nafus and Post South 38° 15' West 570.9 feet to a point; South 66° 30' West 346.5 feet to a point at the end of a stone wall at break in said wall; thence continuing along Post lands and along center of said wall South 39° 15' West East 363 feet to a point at the intersection with another wall marking division line of Draper C. Taylor; thence along Draper Taylor lands South 50° 30' West 1,640 feet to a point at the end of said stone wall common to lands of Lyman Gardner's; thence along said Gardner's lands marked by an old wire fence and thence by a stone wall North 39° 30' West 1,345 feet to the intersection with another stone wall common to other lands of Draper C. Taylor (A 28 feet lane with right-of-way to Draper C. Taylor extends along the last mentioned line and is excepted from this conveyance a distance of 1,345 feet on a course North 39° 30' West parallel to lands of Gardner's); thence along a stone wall North 50° 30' East 2,656.85 feet to a point common to lands now or formerly of Maude E. McLaughlin (D.B. 478, page 548); thence along McLaughlin's land south 40° 20' East 348.15 feet along a stone wall to a point and North 18° 48 East 159 feet to a point in the center of aforementioned state highway; thence along state highway North 25° 56' West 145.2 feet to a point in the center thereof; thence North 50° 30' East 503 feet to an iron pin in a stone wall common to lands of J.H. Snyder; thence along said wall and lands of J. H. Snyder and John Tinklepaugh South 39° 30' East 1,058 feet to a point common to lands of Semian Hubbard at the intersection with another wall; thence along center of said wall and lands of Hubbard, South 50° 30' West, 1,066 feet to the place or point of ***beginning***.

Containing ninety-one acres of land more or less, and being the same lands as shown on a map of lands of Nicholas and Christina Kostukovich as surveyed by Paul A. Lucas, Registered Engineer #7565-E and dated April 4, 1970.

SUBJECT to the same exceptions and reservations as are contained in prior deeds in the chain of title.

PARCEL TWO: PIN NUMBER: **07101-020-002**

ALL the certain piece or parcel of land situate, lying and being in the Scott Township, County of Lackawanna, and State of Pennsylvania, being bounded and described as follows, to wit:

BEGINNING at a point in the center of Pennsylvania State Highway T.R. #347 (extended) leading from Justus corners to Craig (known locally as Craig Road). said point being the common corner of lands of Robert Archkosky and Michael Koslab; thence along center of said road South 17° 18' West 215 feet to a point; thence through Koslab lands North 42° 53' West 589.20 feet to a point common to lands of Kazmierski; thence along Kazmierski lands North 49° 32' East 187.5 feet more or less to a point common to lands of R. Archkosky; thence along Archkosky lands South 42° 53' East 483.50 feet to the place of ***beginning***.

Containing 2.2 acres of land more or less and being the same lands as shown on a map of a portion of lands of Koslab conveyed to Rose Mary Koslab as surveyed by Paul A. Lucas, Registered Engineer #7565-E and dated February 7, 1970.

SUBJECT TO the exceptions and reservations as are contained in prior deed in the chain of title.

BEING THE SAME premises conveyed by Rose Mary Knick to Margaret Koslab by deed dated December 23, 1992, and recorded in the Office of the Recorder of Deeds in and for Lackawanna County, Commonwealth of Pennsylvania at Deed Book

Volume 1419 pages 454-44457 incl., on December 31, 1992.

And the Grantor will warrant Generally the property conveyed.

THIS DOCUMENT MAY NOT SELL, CONVEY, TRANSFER, INCLUDE OR INSURE THE TITLE TO THE COAL AND RIGHT OF SUPPORT UNDERNEATH THE SURFACE LAND DESCRIBED OR REFERRED TO HEREIN AND THE OWNER OR OWNERS OF SUCH COAL MAY HAVE THE COMPLETE LEGAL RIGHT TO REMOVE ALL OF SUCH COAL AND, IN SUCH CONNECTION DAMAGE MAY RESULT TO THE SURFACE OF THE LAND AND ANY HOUSE, BUILDING OR OTHER STRUCTURE ON OR IN SUCH LAND, THE INCLUSION OF THIS NOTICE DOES NOT ENLARGE, RESTRICT OR MODIFY ANY LEGAL RIGHT OR ESTATES OTHERWISE CREATED, TRANSFERRED, EXCEPTED OR RESERVED BY THIS INTSTRUMENT.

THIS IS A TRANSFER FROM Sister TO Sister, THEREFORE NO TRANSFER TAX IS REQUIRED.

No title search was performed nor certificate of title issued with regards to this conveyance.

In witness Whereof, the Grantor has hereunto set her hand and seal the day and year first above written.

Witness:

s/ Anne Marie Howells

s/ Margaret Koslab
Margaret Koslab

STATE OF PENNSYLVANIA :

: SS

COUNTY OF LACKAWANNA :

On this 14th day of April, 2008, before me, a Notary Public, personally appeared ***Margaret Koslab***, known to me to be the person whose names is subscribed to the within instrument, and acknowledged that she executed the same for the purpose therein contained.

In Witness Whereof, I Hereunto set my hand and official seal.

(Notarial Seal) s/ Anne Marie Howells

I hereby certify the precise address of the Grantee is:

1536 Country Club Road
Jermyn, Pa 18433

s/ Anne Marie Howells
Attorney for Grantee

Document 39-1 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

EXHIBIT B TO COMPLAINT

Robert A. Cecchini
Attorney at Law

103 East Drinker Street *(570)347-7887 phone*
Dunmore, PA 18512 *(570)347-9462 fax*

October 23, 2008

Richard A. Fanucci, Esquire
1418 Main Street, Suite 206
Peckville, PA 18452

RE: Scott Township

Dear Attorney Fanucci:

Please be advised that I have been retained by Rose Knick regarding her concern that Scott Township is being mislead and is contemplating action regarding the location and/or regulation and/or maintenance of a cemetery and/or burial ground allegedly on her property. Rose has provided me with certain information from Scott Township Board of Supervisors meetings of September 18, 2008 and October 16, 2008 wherein individuals indicated that they were looking for help to access a cemetery plot. If you are referencing property of Rose Knick please advise me immediately. If so, this correspondence shall serve as notice to you and the Board of Supervisors that I am requesting any and all documentation and/or information under the Right to Know Act that relates to the existence of a cemetery or burial ground on my client's property. Furthermore, without any information regarding same, you should advise the Township Supervisors and/or employees of the Township that no one is allowed on this private property without my client's knowledge and consent. If there are any graves on the property we will do whatever is necessary and appropriate to resolve this matter in accordance with the laws applicable.

In further response to statements made by you, as Solicitor for the Township, it is my understanding that you have determined that there is a cemetery based on information provided to you and that you have indicated same to the Township Supervisors. You apparently are relying on the Second Class Township Code wherein you stated that the Township can force a property owner to clean up a cemetery and further indicated that notice can be given accordingly. I believe this begs the question, since the Second Class Township Code and Pennsylvania Municipality Act from which it came 53 P.S. § 66536 regarding cemeteries provides in subsection (b) for such action where the cemetery or burial ground is "abandoned". Before the Township can act under subsection (b) it must establish that a cemetery exists. The term cemetery is not defined under the Second Class Township Code nor is it defined in the Municipality Act, but Black's Law Dictionary provides a definition for cemetery as follows:

> "A graveyard or burial ground, a place set apart for interment of the dead."

Furthermore, although the term burial ground is also not defined in Black's Law Dictionary defines burial place as follows:

> "A portion of ground set apart for or occupied by a grave or as a grave or graveyard."

My client's property has no designated area or place set apart that can be identified as such.

Furthermore, even if an area of my client's property could be considered a cemetery or burial ground the Court's have dealt with the concept of abandonment and in *Petition of First Evangelical Lutheran Church of Greensburg PA*, 13 D & 2d 93, 39 West 213 (1958), the Court held that where all resemblance to a cemetery had ceased, all interments had been prohibited and it can no longer be said that the cemetery represents any monument or memory to the dead. Therefore, the legal owner has a right to use the property as he or she sees fit. In order for there to be sufficient evidence of the existence of a cemetery there must be graves, stones, monuments and the like. [See *Petition of Chester Montly Meeting of Religious Society of Friends*, 56 D&C 231 (1946)]

Finally, it would seem to me that the Township involvement is totally unnecessary and could be considered an abuse of authority as it relates to their overall responsibility to ensure fiscal management of the Township. Any action by the Township should follow the procedures of the Township Code and the Pennsylvania Municipal Act under § 66536 (a) regarding action by *ordinance* to make rules and regulations regarding location, operation, and maintenance of cemeteries in the Township. As you properly stated at the Township Meeting the Township Supervisors action is *NOT REQUIRED* and in fact under § 66537 the Board of Supervisors may purchase plots in a cemetery for the interment of service men or service women if it is determined that such individuals were buried on private lands. In addition, it should be noted to the Supervisors that the Pennsylvania Courts have held that a person whose ancestors or close collateral relatives are interned in a private burial ground they would have standing to insist upon its preservation. [See *Barrick vs. Hockensmith*, 69 D&C 2d 475, 26 Com.L.J. 182 (1975)]. Accordingly, why should the Township taxpayers be responsible for a private matter and to initiate an investigation to make a determination that a cemetery even exists before it can proceed with requesting that the owner clean it up could certainly be costly to the Township and could be considered a misuse of municipal funds. Certainly, if there are veterans or any remains of service men that can be located on my client's property, we will cooperate to the fullest to have these properly removed and relocated, balanced against my client's rights for the protection of her property rights. By copy of this letter I am advising the Township Supervisors of our position in this matter and await hearing from you as per my documentary request stated above herein.

Very truly yours,

s/ Robert A. Cecchini
Robert A. Cecchini

RAC:blh
cc: Rose Knick
James Black
Dave Makala
Michelle Duchnik

Document 39-1 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

EXHIBIT C TO COMPLAINT

SCOTT TOWNSHIP
LACKAWANNA COUNTY
ORDINANCE NO. ______________

ORDINANCE OF THE TOWNSHIP OF SCOTT TOWNSHIP, LACKAWANNA COUNTY, PENNSYLVANIA, RELATING TO THE OPERATION AND MAINTENANCE OF CEMETERIES AND BURIAL PLACES.

WHEREAS, Scott Township is a Pennsylvania Township of the Second Class duly organized and existing under the laws of the Commonwealth of Pennsylvania; and

WHEREAS, the Second Class Township Code grants the Board of Supervisors of the Township to adopt Ordinances in which general or specific powers of the Township may be exercised in order to promote the health, safety and welfare of its residents; and

WHEREAS, 53 P.S. §66536 (a) (§1536) entitled "Cemeteries" authorizes Board of Supervisors to make rules and regulations regarding the location, operation and maintenance of cemeteries within the Township by Ordinance; and

WHEREAS, the Board of Supervisors of Scott Township believes that regulating cemeteries within the Township serves in the best interest of the Township.

NOW, THEREFORE, the Board of Supervisors of the Township of Scott, Lackawanna County, Pennsylvania, hereby **ENACTS** and **ORDAINS** as follows:

1.) **Definitions** –

a. "Burial Place" – A portion of ground either occupied by a tomb or grave or set apart for a tomb or grave for burial of the dead.

b. "Code Enforcement Officer" – The person duly appointed as the official Code Enforcement Officer for Scott Township, Lackawanna County.

c. "Cemetery" – A place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings.

d. "Owner" – An individual(s), entity, group, association or organization who holds title to the land upon which any cemetery is located or who is otherwise vested with the authority to operate/maintain same.

e. "Township" – Scott Township, Lackawanna County, Pennsylvania.

2.) **Applicability** – All cemeteries, whether private or public, and whether existing or established prior to the date of this Ordinance or hereafter created, are subject to the terms and conditions of this Ordinance.

3.) **Establishing Cemeteries** – It shall be unlawful for any person or owner to establish any cemetery or to bury any person within the Township, except within a cemetery duly established in accordance with all laws, regulations, ordinances and procedures.

4.) **Maintenance of Cemeteries** – It shall be the duty of every owner to properly maintain and upkeep any cemetery. No owner shall allow grass, weeds or trees to accumulate upon same to the extent that any grave marker is obstructed and shall otherwise keep same free of debris and refuse.

5.) **Abandoned/Neglected Cemeteries** – When any cemetery or burial place is abandoned or is being neglected and not up-kept or maintained, the Code Enforcement Officer, on behalf of the Board of Supervisors, shall give written notice to the owner directing the removal of weeds, trees, refuse and/or other debris from the cemetery within thirty (30) days. If the removal is not completed within thirty (30) days after the written notice, the Township may enter upon the property and provide for the removal to be done by employees of the Township or persons hired for such purpose at the Township's expense. All costs of removal shall be assessed against the owner, if known, and thereafter shall be collected by the Township pursuant to 53 P.S. §68302(b) of the Second Class Township Code. The Code Enforcement Officer and/or his/her agents and representatives may enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery, in order to ensure compliance with the terms and provisions of this Ordinance.

6.) **Violations/Penalties/Enforcement** – Any person or owner who violates or permits a violation of this Ordinance, upon being found liable therefore in a civil enforcement proceeding before a District Justice or Magisterial District Justice, shall pay a fine and/or penalty of not less than Three Hundred ($300.00) Dollars nor more than One Thousand ($1,000.00) Dollars per violation, plus all court costs, including reasonable attorney's fees incurred by the Township in the enforcement of this Ordinance. Each day that the violation exists shall constitute a separate offense. In any case where penalty for a violation has not been timely paid, and the person against whom the penalty is found to have been liable therefore in civil proceedings, the violator shall be liable for the penalty imposed including additional reasonable attorney's fees incurred by the Township in any enforcement proceedings. If the violator neither pays nor timely appeals the judgment, once final, the Township may enforce the judgment pursuant to the applicable rules of civil procedure.

Nothing contained herein shall preclude the Township and/or Code Enforcement Officer from instituting any other appropriate civil or equitable proceeding to restrain, correct or abate a violation of this Ordinance as may be allowed for under any and all appropriate laws, statutes, Ordinances and/or regulations.

7.) **Other Laws, Ordinances, Codes or Regulations** – Nothing contained herein shall be deemed to nullify, replace, repeal or abrogate any other law, ordinance, rule, code or regulation regarding cemeteries and same shall be separately applicable and/or enforceable in accordance with their own terms.

8.) **Severability** – If any sentence, clause, section or part of this Ordinance is, for any reason, found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not effect or impair any of the remaining provisions, sentences, clauses or parts of this Ordinance and same shall remain in full force and effect.

9.) **Effective Date** – This Ordinance shall become effective five (5) days from the date of its enactment.

This Ordinance is **DULY ENACTED AND ORDAINED** on this ____ day of ________, 2012, at a duly advertised public meeting of the Board of Supervisors.

ATTEST:

Secretary

Supervisor – Chairman

Supervisor

Supervisor

Document 39-1 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

EXHIBIT D TO COMPLAINT

SCOTT TOWNSHIP
LACKAWANNA COUNTY
ORDINANCE NO. 12-12-20-001

ORDINANCE OF THE TOWNSHIP OF SCOTT TOWNSHIP, LACKAWANNA COUNTY, PENNSYLVANIA, RELATING TO THE OPERATION AND MAINTENANCE OF CEMETERIES AND BURIAL PLACES.

WHEREAS, Scott Township is a Pennsylvania Township of the Second Class duly organized and existing under the laws of the Commonwealth of Pennsylvania; and

WHEREAS, the Second Class Township Code grants the Board of Supervisors of the Township to adopt Ordinances in which general or specific powers of the Township may be exercised in order to promote the health, safety and welfare of its residents; and

WHEREAS, 53 P.S. §66536 (a) (§1536) entitled "Cemeteries" authorizes the Board of Supervisors to make rules and regulations regarding the location, operation and maintenance of cemeteries within the Township by Ordinance; and

WHEREAS, the Board of Supervisors of Scott Township believes that regulating cemeteries within the Township serves in the best interest of the Township.

NOW, THEREFORE, the Board of Supervisors of the Township of Scott, Lackawanna County, Pennsylvania, hereby ENACTS and **ORDAINS** as follows:

1.) **Definitions** –

a. "Burial Place" – A portion of ground either occupied by a tomb or grave or set apart for a tomb or grave for burial of the dead.

b. "Code Enforcement Officer" – The person duly appointed as the official Code Enforcement Officer for Scott Township, Lackawanna County.

c. "Cemetery" – A place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings.

d. "Owner" – An individual(s), entity, group, association or organization who holds title to the land upon which any cemetery is located or who is otherwise vested with the authority to operate/maintain same.

e. "Township" – Scott Township, Lackawanna County, Pennsylvania.

2.) **Applicability** – All cemeteries, whether private or public, and whether existing or established prior to the date of this Ordinance or hereafter created, are subject to the terms and conditions of this Ordinance.

3.) **Establishing Cemeteries** – It shall be unlawful for any person or owner to establish any cemetery or to bury any person within the Township, except within a cemetery duly established in accordance with all laws, regulations, ordinances and procedures.

4.) **Maintenance of Cemeteries** – It shall be the duty of every owner to properly maintain and upkeep any cemetery. No owner shall allow grass, weeds or trees to accumulate upon same to the extent that any grave marker is obstructed and shall otherwise keep same free of debris and refuse,

5.) **Open to Public** – All cemeteries within the Township shall be kept open and accessible to the general public during daylight hours. No owner or personal shall unreasonably restrict access to the general public nor shall any fee for access be charged.

6.) **Abandoned/Neglected Cemeteries** – When any cemetery or burial place is abandoned or is being neglected and not up-kept or maintained, the Code Enforcement Officer, on behalf of the Board of Supervisors, shall give written notice to the owner directing the removal of weeds, trees, refuse and/or other debris from the cemetery within thirty (30) days. If the removal is not completed within thirty (30) days after the written notice, the Township may enter upon the property and provide for the removal to be done by employees of the Township or persons hired for such purpose at the Township's expense. All costs of removal shall be assessed against the owner, if known, and thereafter shall be collected by the Township pursuant to 53 Y.S. §68302(b) of the Second Class Township Code. The Code Enforcement Officer and/or his/her agents and representatives may enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery, in order to ensure compliance with the terms and provisions of this Ordinance.

7.) **Violations/Penalties/Enforcement** – Any person or owner who violates or permits a violation of this Ordinance, upon being found liable therefore in a civil enforcement proceeding before a District Justice or Magisterial District Justice, shall pay a fine and/or penalty of not less than Three Hundred (**$300.00**) Dollars nor more than Six Hundred (**$600.00**) Dollars per violation, plus all court costs, including reasonable attorney's fees incurred by the Township in the enforcement of this Ordinance. Each day that the violation exists shall constitute a separate offense. In any case where penalty for a violation has not been timely paid, and the person against whom the penalty is imposed is found to have been liable therefore in civil proceedings, the violator shall be liable for the penalty imposed including additional reasonable attorney's fees incurred by the Township in any enforcement proceedings. If the violator neither pays nor timely appeals the judgment, once final, the Township may enforce the judgment pursuant to the applicable rules of civil procedure.

Nothing contained herein shall preclude the Township and/or Code Enforcement Officer from instituting any other appropriate civil or equitable proceeding to restrain, correct or abate a violation of this Ordinance as may be allowed for under any and all appropriate laws, statutes, Ordinances and/or regulations.

8.) **Other Laws, Ordinances, Codes or Regulations** – Nothing contained herein shall be deemed to nullify, replace, repeal or abrogate any other law, ordinance, rule, code or regulation regarding cemeteries and same shall be separately applicable and/or enforceable in accordance with their own terms.

9.) **Severability** – If any sentence, clause, section or part of this Ordinance is, for any reason, found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not effect or impair any of the remaining provisions, sentences, clauses or parts of this Ordinance and same shall remain in full force and effect.

10.) **Effective Date/Repealer** – This Ordinance shall become effective five (5) days from the date of its enactment. Upon the effective date of this Ordinance, Ordinance #12-10-18-001 is hereby repealed in its entirety.

This Ordinance is **DULY ENACTED AND ORDAINED** on this 20th day of December, 2012, at a duly advertised public meeting of the Board of Supervisors.

ATTEST:

s/ Thomas W. Wuks **Secretary**	s/ David Makala **Supervisor – Chairman**
	s/ Edward R. Hlavaty **Supervisor**
	Supervisor

Document 39-1 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

EXHIBIT E TO COMPLAINT

SCOTT TOWNSHIP

An Historic Community Founded 1840

COMMONWEALTH OF PENNSYLVANIA

1038 MONTDALE RD. SCOTT TOWNSHIP, PA
18447 PHONE: 570-319-1296 • FAX: 570-319-1321

April 11, 2013

****NOTICE OF VIOLATION****

Rose Knick
49 Country Club Rd
Scott Township Pa 18433

Ms. Knick,

On April 10, 2013 an inspection was made of your property on Country Club Rd. based on information that there may be a cemetery on the property. Multiple grave markers/tombstones were found during this inspection. As a result, it has been determined that a "cemetery" as defined by ordinance 12-12-20-001 exists on your property.

This letter will serve as notice that you are in violation of the above referenced ordinance, Section # 4, which requires that all cemeteries be maintained and kept up by the owner of the property where it resides. "No owner shall allow grass, weeds or trees to accumulate upon same to the extent that any grave marker is obstructed and shall otherwise keep same free of debris and refuse." The stones located on your property were found to be obscured by trees, dirt and weeds. Others have been buried or covered with dirt and leaves.

It has also been determined that you are in violation of section # 5 of the ordinance which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours. No owner or personal shall unreasonably restrict access to the general public nor shall any fee for access be charged.

Within 30 days from that date of this notice, you are directed to remove any weeds, trees or debris from the cemetery that may be obscuring the graves or markers. The stones that are in the cemetery should be made visible and restored as much as possible, in that they should be stood up to their original position or at the very least laid on the grave face up so that the graves can be identified.

You are also directed to make access to the cemetery available to the public during daylight hours as required by the ordinance.

A second inspection of the property will be conducted in 31 (THIRTY ONE) days from the date of this letter. If the cemetery has not been cleaned, the Township will enter upon the property and provide for the removal to be done by employees of the Township or persons hired for such purpose at the Township's expense. All costs of removal and clean up shall be assessed against the you as the property owner and thereafter shall be collected by the Township pursuant to 53 P.S. §68302(b) of the Second Class Township Code.

In addition, failure to comply with either of these requirements will result in a civil enforcement action being brought by the Township. Upon being found liable in a civil enforcement proceeding before a District Justice or Magisterial District Justice, You shall pay a fine and/or penalty of not less than Three Hundred ($300.00) Dollars nor more than Six Hundred ($600.00) Dollars per violation, plus all court costs, including reasonable attorney's fees incurred by the Township in the enforcement of this Ordinance. Each day that the violation exists shall constitute a separate offense.

As always our goal is compliance with the Ordinances of the Township rather that punishment, as such I look forward to your cooperation in this matter. If you have any questions feel free to contact me at the Township Office at 570.319.1296 ext 6 Monday-Friday.

Thank You

s/Carl S. Ferraro
Carl S. Ferraro
Code Enforcement Officer

Sent via certified and first class mail

Cc: File
Supervisors
Solicitor

Document 39-2 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

Oliver, Price & Rhodes
Joseph A. O'Brien, Esquire
Attorney I.D. No. 22103
1212 South Abington Road
P.O. Box 240
Clarks Summit, PA 18411
Ph: (570) 585-1200
Fax: (570) 585-5100
Email: jaob@oprlaw.com

Filed 8/27/2014

ROSE MARY KNICK, Plaintiff	IN THE COURT OF COMMON PLEAS LACKAWANNA COUNTY
vs.	
SCOTT TOWNSHIP,	CIVIL ACTION – LAW
Defendant	No. 2013-CV-2309

NOTICE TO PLEAD

TO: Frank Bolock, Esquire

TO: Rose Mary Knick,

You are hereby notified to file a written response to the enclosed NEW MATTER within twenty (20) days from service hereof or a judgment may be entered against you.

Respectfully submitted,

/s/ Joseph A. O'Brien, Esquire
Joseph A. O'Brien, Esquire
Attorney I.D. No.: 87641

Oliver, Price & Rhodes
P.O. Box 240
Clarks Summit, PA 18411
Ph: (570) 585-1200
Fax: (570) 585-5100
E-mail: jaob@oprlaw.com

ROSE MARY KNICK, Plaintiff	IN THE COURT OF COMMON PLEAS LACKAWANNA COUNTY
vs.	
SCOTT TOWNSHIP, Defendant	CIVIL ACTION No. 2013-CV-2309

ANSWER AND NEW MATTER OF DEFENDANT, SCOTT TOWNSHIP, TO THE COMPLAINT OF PLAINTIFF, ROSE MARY KNICK

1-2. Admitted

3. Defendant lacks knowledge or information sufficient to form a belief as to the allegations of these paragraphs and demands strict proof thereof at the trial of this matter.

4. Defendant lacks knowledge or information sufficient to form a belief as to the allegations of these paragraphs and demands strict proof thereof at the trial of this matter.

5-11. Admitted.

12. Denied as stated. In further answer Defendant alleges that the actions taken by the Scott Township Code Enforcement Officer were authorized under Township and State law.

13-14. Denied as stated. The allegations in these paragraphs constitute conclusions of law and, therefore, are deemed denied.

15. The Defendant re-alleges each and every allegation contained in paragraphs 1-14 of this Answer and incorporates them herein by reference thereto.

16-27. Denied as stated. The allegations of these paragraphs constitute conclusions of law and, therefore, are deemed denied.

28. The Defendant re-alleges each and every allegation contained in paragraphs 1-27 of this Answer and incorporates them herein by reference thereto.

29-34. Denied as stated. The allegations of these paragraphs constitute conclusions of law and, therefore, are deemed denied.

35. Defendant re-alleges each and every allegation contained in paragraphs 1-34 of this Answer and incorporates them herein by reference thereto.

36-44. Denied as stated. The allegations of these paragraphs constitute conclusions of law and, therefore, are deemed denied.

New Matter

1. Plaintiff Complaint fails to state a claim upon which relief can be granted.

2. The Ordinance passed by the Township and the actions taken by Township officials constitute a valid exercise of the Township Police's powers and, therefore, the Plaintiffs

claim for Declaratory and Injunctive Relief should be denied.

Respectfully submitted,

/s/ Joseph A. O'Brien
Joseph A. O'Brien, Esquire
Attorney I.D. No.: 22103
ATTORNEY FOR DEFENDANT,
SCOTT TOWNSHIP
Oliver, Price & Rhodes
1212 South Abington Road
Clarks Summit, PA 18411
Tel: (570) 585-1200
Fax: (570) 585-5100
Email: jaob@oprlaw.com

VERIFICATION

I, Carl Ferraro, Code Enforcement Officer of Scott Township, verify that the statements made in this ANSWER AND NEW MATTER are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904, relating to the unsworn falsification to authorities.

Date: 8/21/14 /s/ Carl Ferraro

CERTIFICATE OF SERVICE

I, **Joseph A. O'Brien, Esquire**, of Oliver, Price & Rhodes, hereby certify that on the 25th day of August, 2014, I served a true and correct copy of the foregoing ANSWER AND NEW MATTER by placing the same in the United States Mail, First Class Postage

Prepaid, at Clarks Summit, Pennsylvania, addressed as follows:

Frank J. Bolock, Jr., Esquire
212 Front Street
Clarks Summit, PA 18411

/s/ Joseph A. O'Brien, Esquire
Joseph A. O'Brien, Esquire

* * * * *

Document 39-3 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

Filed 5/9/2013

FRANK J. BOLOCK, JR., ESQ.
Atty. I.D. 29983
212 Front Street
Clarks Summit, PA 18411
Tel. (570) 585-5600
Fax (570) 585-5601
Attorney for Rose Mary Knick

ROSE MARY KNICK 49 COUNTRY CLUB ROAD SCOTT TOWNSHIP, PA 18433 Plaintiff	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
vs.	ACTION SEEKING DECLARATORY JUDGMENT and INJUNCTIVE RELIEF
SCOTT TOWNSHIP 1038 MONTDALE ROAD SCOTT TOWNSHIP, PA 18447 Defendant	2013-CV-2309

EMERGENCY MOTION FOR INJUNCTIVE RELIEF

AND NOW, comes Plaintiff, Rose Mary Knick, by and through Attorney Frank J. Bolock, Jr., who moves the Court to preclude and enjoin Defendant, Scott

Township, preliminarily after hearing and thereafter permanently, and in support avers as follows:

1. Plaintiff, Rose Mary Knick, incorporates herein all of the allegations set forth in her Complaint seeking Declaratory and Injunctive Relief.

2. For the reasons set forth in Plaintiff's Complaint Seeking Declaratory and Injunctive Relief Scott Township Ordinance No. 12-12-20-001 is unconstitutional. Scott Township's attempt to enforce said Ordinance through its warrantless entry onto Plaintiff's private property is violative of Plaintiff's Fourth Amendment protection against unreasonable and warrantless searches of private property.

3. Defendant, Scott Township's Ordinance No. 12-12-20-001 is unconstitutional and illegal and Scott Township's efforts to enforce the illegal, unconstitutional Ordinance through the warrantless entry onto the private property of Plaintiff on April 10, 2013 exists as a blatant violation of Plaintiff's constitutionally protected rights.

4. There is no adequate remedy for the unconstitutional and unreasonable actions taken by Defendant, Scott Township in violation of Plaintiff's constitutional rights other than to preclude and enjoin Defendant Scott Township in its effort to enforce its unconstitutional Ordinance against Plaintiff and her property.

5. Defendant, Scott Township will not be prejudiced by the granting of the relief requested.

WHEREFORE, Plaintiff, Rose Mary Knick, respectfully requests the Court to enter an Order of Injunction prohibiting Defendant, Scott Township, from proceeding forward with their prosecution of

Plaintiff as outlined in their April 11, 2013 Notice of Violation. Further, that the Court grant the prayer for relief set forth in the Complaint and to grant to Plaintiff such other relief which the Court deems just, proper and necessary; retain jurisdiction of this matter to grant further relief as may hereinafter appear just, necessary and proper, including the award of attorneys' fees.

Respectfully submitted,

s/ Frank J. Bolock, Jr.
Frank J. Bolock, Jr., Esquire
Atty. I.D. No. 29983
212 Front Street
Clarks Summit, PA 18411
Tel. (570) 585-5600
Fax (570) 585-5601

Attorney for Plaintiff
Rose Mary Knick

VERIFICATION

I, Rose Mary Knick, verify that the facts set forth in the aforegoing Motion for Preliminary Injunction are true and correct to the best of my knowledge, information and belief.

I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904, relating to unsworn falsification to authorities.

Date: 5/7/13

s/ Rose Mary Knick
Rose Mary Knick

Document 39-3 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

Filed 5/9/2013

ROSE MARY KNICK 49 COUNTRY CLUB ROAD SCOTT TOWNSHIP, PA 18433	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff vs.	ACTION SEEKING DECLARATORY JUDGMENT and INJUNCTIVE RELIEF
SCOTT TOWNSHIP 1038 MONTDALE ROAD SCOTT TOWNSHIP, PA 18447 Defendant	2013-CV-2309

ORDER

AND NOW, this 9th day of May, 2013, upon consideration of the Plaintiff's Emergency Motion for Injunctive Relief, Defendant Scott Township's agreement to withdraw its Notice of Violation dated April 11, 2013 and in accordance with a Stipulation of Counsel for the Parties it is Hereby Ordered that all proceedings by Defendant Scott Township to enforce Ordinance No. 12-12-20-001 against Plaintiff Rose Mary Knick are Stayed pending the resolution of the issues raised in the underlying Complaint seeking Declaratory and Injunctive Relief.

s/ Nealon J.

Document 39-5 Filed 10/25/2016
United States District Court
for the Middle District of Pennsylvania

From: Frank [fbolock@bolocklaw.com]
Sent: Wednesday, September 07, 2016 8:35 PM
To: Kozlowski, Mark J.
Subject: FW: Knick v. Scott Township; 14-2223

From: judith_malave@pamd.uscourts.gov [mailto:judith_malave@pamd.uscourts.gov
Sent: Tuesday, September 06, 2016 11:59 AM
To: fbolock@bolocklaw.com
Cc: robin@bolocklaw.com
Subject: Knick v. Scott Township; 14-2223

Attorney Bolock:

With reference to the pending Motion to Dismiss, and oral argument held in this case last week before Judge Caputo, would you have copies of the pleadings which were originally filed in the Court of Common Pleas of Lackawanna County? I note you make reference to them in the Amended Complaint (pp. 23, 24, 25, 28). If you have copies in your file, would you please provide copies to our Chambers? If possible, could you scan and email them to me as a return email and attachment?

Thank you in advance . . . please call me if you have any questions.

Judy Malave
Courtroom Deputy to Honorable A. Richard Caputo
United States District Court – Middle District of PA
Wilkes-Barre, PA 18701
(570) 831-2559
Facsimile: (570) 829-3948
judith_malave@pamd.uscourts.gov

From: Frank [fbolock@bolocklaw.com]
Sent: Wednesday, September 07, 2016 8:34 PM
To: judith_malave@pamd.uscourts.gov
Cc: 'J. David Breemer'; Kozlowski, Mark J.

Subject: Knick v Scott Township Pleadings from Lackawana Court of Common Pleas 2013 CV 2309

Attachments: Knick Complaint seeking Declaratory and Injunctive relief.pdf; Knick Emergency Motion for Injunctive Relief and Order of Cour.pdf; Scott Township Answer and New Matter.pdf; Knick Reply to Scott Township New Matter.pdf

Judy, as per your request please find attached copies of the pleadings filed in the Lackawanna County Court proceeding. Please let me know if you need anything else. Thank you, Frank Bolock

Bolock Law
212 Front Street
Clarks Summit, PA 18411

Tel: (570) 585-5600
Toll Free: 1-888-511-6860
Fax: (570) 585-5601

Email: FBolock@BolockLaw.com
Website: www.BolockLaw.com

Document 41 Filed 12/8/2016

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

ROSE MARY KNICK, **Plaintiff**	**CIVIL ACTION LAW**
vs.	**JURY TRIAL DEMANDED**
SCOTT TOWNSHIP and CARL S. FERRARO, Individually and in his Official Capacity as a Scott Township Code Enforcement Officer, **Defendants**	**CASE NO.: 3:14-CV-02223-RDM** *Electronically Filed*

ORDER

AND NOW, this 8th day of December, 2016, upon consideration of the *MOTION TO SUPPLEMENT RECORD ON APPEAL PURSUANT TO F.R.A.P. 10(e)(2)(B)*, it is **HEREBY ORDERED AND DECREED** that:

1.) the following documents shall be added to the record in the above-captioned matter and to the record on appeal in this matter and/or to the record on appeal before the Third Circuit Court of Appeals, at Docket No.: 16-3587: a.) Complaint Seeking Declaratory Judgment and Injunctive Relief, Lackawanna County C.C.P. Docket No.: 2013-CV-2309, b.) Answer with New Matter of Scott Township, Lackawanna County C.C.P. Docket No.: 2013-CV-2309, c.) Emergency Motion for Injunctive Relief, Lackawanna County C.C.P. Docket No.: 2013-CV-2309, and d.) Reply to New Matter of Plaintiff, Rose Mary Knick, Lackawanna County C.C.P. Docket No.: 2013-CV-2309, to the record on appeal in this matter; and,

2.) the Clerk of this District Court certify and forward the above-referenced documents, as part of a supplemental record, to the Third Circuit Court of Appeals (Docket No.: 16-3587), as authorized by *Rule 10(e)(2)(B) of the Federal Rules of Appellate Procedure.*

By the Court:

s/ A. Richard Caputo
J.

No. 17-647

In The

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO, Individually and in his Official Capacity as Scott Township Code Enforcement Officer,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S BRIEF ON THE MERITS

J. DAVID BREEMER
Counsel of Record
MERIEM L. HUBBARD
BRIAN T. HODGES
CHRISTINA M. MARTIN
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
E-mail: jbreemer@pacificlegal.org

Counsel for Petitioner

QUESTION PRESENTED

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court. *See Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

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OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals is reported at *Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2017). It is attached to the Petition as Petition Appendix (Pet. App.) A. The decision of the district court is unpublished. It is attached to the Petition as Appendix B.

JURISDICTION

The lower courts had jurisdiction over this case under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution. The Court of Appeals for the Third Circuit entered final judgment on July 6, 2017. Pet. App. C. The Petition for Certiorari was timely filed on October 31, 2017, after an extension of time up to and including November 1, 2017. The Court granted the Petition on March 5, 2018. It has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

The central issue in this case is whether American property owners like Petitioner Rose Mary Knick (Ms. Knick) are entitled to a realistic and fair opportunity to seek compensation for a "taking" of property within the meaning of the Fifth Amendment. As it stands now, they have no such opportunity due to the ripeness doctrine set out in *Williamson County*

Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-96 (1985). Under that decision, property owners cannot hold the government liable for a taking of property in federal court until they exhaust state court remedies. *Id.* In application, this rule bars citizens from vindicating their constitutional property rights in federal courts and strips them of reasonable access to state courts. In this case, ***Williamson County***'s state litigation requirement prevented the district court from hearing Ms. Knick's claim that the Township of Scott (Township) took her property when it gave members of the public and Township officials a right to physically occupy her land. Pet. App. A at 32; *see generally, Nollan v. California Coastal Comm'n*, 483 U.S 825, 831 (1987).

The dispute traces to the Township's enactment of an ordinance (Ordinance) that allows Township officials and the public to access any private land containing a burial ground of any size. The Township decided that this law applies to Ms. Knick, a single woman who owns and lives on 90 acres of private farmland. Pet. App. A at 3-4. After searching her land, it commanded her to open it to daily public access—originating from some undefined point along the nearest public road—and to allow people to intrude 300 yards into her property to reach an area the Township identified as a small gravesite. Joint Appendix (JA) at 10, 97, 110-12.

When Ms. Knick asserted below that the Ordinance's property access requirements cause a compensable taking, the Third Circuit Court of Appeals agreed that the Ordinance is "extraordinary" and "constitutionally suspect." Pet. App. A at 3. Yet, it held that, under *Williamson County*, the district court could not rule on whether the law caused a taking warranting compensation until Ms. Knick sought compensation in Pennsylvania state courts. *Id.* This was wrong. Contrary to the dicta in *Williamson County*, the existence of a state damages remedy has no bearing on the ripeness of a federal takings claim, and property owners need not exhaust state remedies before litigating a crystalized takings controversy like this one.

STATEMENT OF THE CASE

A. Factual Background

1. The Setting and Ms. Knick's Property

The Township of Scott is a small community located in Lackawanna County, Pennsylvania, a rural area in the eastern part of the state. The Township lies approximately twenty miles to the north of Scranton, Pennsylvania. It is common to find private, family gravesites in the area because Pennsylvania state law allows so-called "backyard burials;" the practice of burying the deceased on private property. *See* Patricia E. Salkin, *Zoning and Land Use Planning*, 39 Real Est. L.J. 526, 530 (Spring 2011); *see also* Craig Smith, *Home burial on legislators' radar; Meyersdale plans vote*, TribLive, Apr. 5, 2014, http://triblive.com/state/pennsylvania/5788717-74/burial-funeral-property (noting "[t]he practice of tending to one's dead is not new, as evidenced by the number of centuries-old burial sites with time-worn tombstones on private properties throughout Western Pennsylvania"). As the Township explained in a district court hearing, the area "goes back several hundred years in terms of families and burial plots. So while these may not be . . . sprawling cemeteries, you will have small plots that families have maintained for years." JA at 115.

Ms. Knick and her family have owned 90 acres of land in the Township since 1970. The property, located at 49 Country Club Road, Scott Township,[1] JA at 94, ¶ 7, is bisected by a two-lane country road. *Id.* Ms. Knick values her privacy and safety, and her land is accordingly bounded on all sides by stonewalls, fences, and similar monuments. *Id.* ¶ 8. Signs stating "No Trespassing" exist at regular intervals along the boundary. *Id.*

Ms. Knick lives on the property in a single-family residence. JA at 94, ¶ 7. The remaining land is used as a grazing area for horses and other animals. *Id.* There is no public cemetery or public access easement on the land. Ms. Knick has never authorized the public or government agents to cross or otherwise use her land. JA at 95, ¶ 12.

In 2008, Scott Township officials discussed an alleged burial ground on Ms. Knick's property, in apparent response to a public inquiry. JA at 95, ¶ 10. In the following period, Ms. Knick informed the Township that the title to her property does not include a reference to a burial ground. After additional research, she also informed the Township that there is no official state registration or documentation of a cemetery. Knick also told the

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[1] In 2008, Ms. Knick's sister deeded her interest in the property to Ms. Knick, leaving Ms. Knick as sole owner. JA at 150.

Township that she was not aware of any physical proof of a burial ground. *Id.* ¶ 11.

2. The Challenged Cemetery Ordinance

In December of 2012, the Township enacted a new law, Ordinance 12-12-20-001, pertaining to the existence, operation, and maintenance of cemeteries. JA at 96, ¶ 14; JA at 20-24 (Ordinance). Two of the Ordinance's provisions are relevant here.

Section 5 requires that "[a]ll cemeteries . . . shall be kept open and accessible to the general public during daylight hours." JA at 22. This provision applies to "[a]ll cemeteries, whether private or public, and whether existing or established prior to the . . . Ordinance." JA at 21. A "cemetery" is defined as "[a] place or area of ground, whether contained on private or public property, which has been set apart for or otherwise utilized as a burial place for deceased human beings." *Id.*

In the district court, the Township explained that section 5 creates a public "easement" from the nearest public road to any cemetery lying on private land. JA at 126; *id.* at 119. The provision "is written to apply to all property owners in Scott Township across the board . . . if there's a cemetery—." JA at 115. The Ordinance does not define the boundaries of the easement imposed on affected properties. JA at 119. Nor does it "limit who specifically should be permitted on" this public right-of-way, JA at 127, the frequency with which people may come and go, or the type of activities they may engage in. The Ordinance does not offer protection for property owners from any liability that may arise from public use of their property.

Section 6 of the Ordinance similarly authorizes the Township's "code enforcement" agents to "*enter upon any property* within the Township for the purposes of determining the existence of and location of any cemetery . . . ." JA at 22 (emphasis added). There is no limit on the number of instances the agents can enter the property, the point at which they can enter or leave, or the amount of time they can stay.

The Ordinance authorizes fines of $300-$600 for every violation of its provisions, plus all court costs, including attorney fees. Each day that a violation exists is deemed a separate offense. JA at 23.

3. Enforcement of the Ordinance Against Ms. Knick

On April 10, 2013, after enactment of the Ordinance, the Township's Code Enforcement Officer entered Ms. Knick's land without her consent. JA at 97, ¶ 20. A day later, the Township issued a Notice of Violation to Ms. Knick informing her that an "inspection" of her land identified "[m]ultiple grave markers/ tombstones."[2] JA at 107-08. According to the Notice, "stones located on [the] property" constitute a "cemetery" subject to the Ordinance. *Id.*

The Notice goes on to declare that Ms. Knick is "in violation of section # 5 . . . which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours." It orders her "to make access to the cemetery available to the public during daylight hours." JA at 108. The Township briefly rescinded this Notice after Ms. Knick filed a complaint in state court. However, a few months later, the Township issued a second, almost identical Notice of Violation to Ms. Knick. JA at 110-12. It too commands her to "make access to the cemetery available to the public" and threatens daily civil fines if she refuses to do so. *Id.* at 111-12.

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[2] Ms. Knick's suit does not challenge the validity of the Township's burial ground determination, but takes issue with the property access requirements triggered by that determination.

B. Judicial Procedure

1. State Court Proceedings

After the Township issued the first Notice of Violation, Ms. Knick filed a Complaint in the Pennsylvania Court of Common Pleas. JA at 132-43. That complaint sought "Declaratory and Injunctive Relief from the Ordinance," in part on the basis that the law caused a taking of property. JA at 136-38. The Township subsequently agreed to withdraw its April 11, 2013, Notice of Violation and to stay enforcement of the Ordinance during the state proceedings. JA at 98, ¶ 24. However, the state court later declined to rule on Ms. Knick's complaint because it believed her claims would not be fit for a decision until the Township filed a separate civil enforcement action against Ms. Knick.[3] JA at 5; *id.* at 98-99, ¶ 25.

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[3] The Township has previously asserted that Ms. Knick's state court action is still "pending." This is true only in the sense that the suit is effectively stayed until the Township files a civil enforcement action, and it has not done that, leaving the case in an unresolvable posture over which Ms. Knick has no control.

2. Federal Procedure

At this point, Ms. Knick turned to the federal district court. There, she filed a complaint alleging that the Ordinance violated her rights under the Fourth Amendment and the Takings Clause of the Fifth Amendment. JA at 6-19. On October 28, 2015, the district court granted the Township's motion to dismiss Ms. Knick's First Amended Complaint. JA at 90-91. However, the court granted Ms. Knick leave to re-plead and clarify some claims, including her federal takings claims. *Id.*

Ms. Knick then filed a Second Amended Complaint. JA at 92-112. That complaint made clear that her federal takings claims consisted of facial and as-applied claims against the Ordinance's property access provisions. JA at 102-03. It alleges, in part, that "Scott Township enacted an ordinance—Ordinance 12-12-20-001—that violates the [T]akings Clause of the Fifth Amendment both on its face and as-applied because it authorizes a physical invasion and seizure of Plaintiff's private land." *Id.* at 92-93. It seeks "a Declaratory Judgment declaring [the] Ordinance unconstitutional, as well as "economic . . . [and] compensatory . . . damages." JA at 93.

On September 7, 2016, the district court issued an order dismissing all of Ms. Knick's takings claims as unripe under *Williamson County*. Pet. App. B at 11-18. The Court specifically held that Ms. Knick's claims would not be ready for a federal decision until she filed and finished a new, "inverse condemnation" suit in state court. *Id.* Ms. Knick timely appealed to the Third Circuit.

At the Third Circuit, Ms. Knick argued that her facial and as-applied takings claims are ripe. The Third Circuit disagreed, however. The court below concluded that this Court's precedent authorizes immediate federal review of a facial takings claim (*i.e.*, without prior state procedures) only if the claim rests on the now-defunct theory that a regulation "fails to substantially advance a legitimate state interest." Pet. App. A at 24-26. It reasoned that this was because such a claim does not invoke the principle of "just compensation." *Id.*

By the same token, the Third Circuit concluded that facial takings claims resting on existing physical and regulatory takings tests are subject to *Williamson County*'s state litigation requirement because they seek the remedy of just compensation. *Id.* at 24-27. It ultimately held that Ms. Knick's facial claim alleging that the Ordinance causes an immediate physical taking of property is unripe until she prosecutes another state court lawsuit. *Id.* at 27-28. The court below also held that Ms. Knick's as-applied claims would not ripen under *Williamson County* until she files and completes an inverse condemnation action in state court. *Id.* at 32.

Ms. Knick petitioned this Court to reconsider the *Williamson County* doctrine that has thus far barred her takings claims. On March 5, 2018, the Court granted the Petition.

SUMMARY OF ARGUMENT

The right to exclude others from private land is a fundamental and protected property right, the denial of which amounts to a taking requiring just compensation. *Nollan*, 483 U.S at 831. In this case, the Township stripped Ms. Knick of her right to exclude strangers from her rural land by creating an easement on the property that allows regular public and governmental access to the land. JA at 22, 126. This encumbrance deprives her of privacy, endangers her safety, threatens to cause damage to her land and saddles her with potential civil liabilities. The burdens on her property amount to a compensable taking under a straightforward application of this Court's precedent, and Ms. Knick sued to establish that fact. *Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994) ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use . . . a taking would have occurred.").

It is generally true, of course, that one may not hold the government accountable for a taking until the issue is ripe for a conclusive determination. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). Prior to the decision in *Williamson County*, this ripeness requirement meant that an owner could not claim a taking until the challenged government action causes a clear and final injury to property. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 346-47 (2005). This traditional "finality" ripeness regime is not challenged here.

Unfortunately, in dicta,[4] *Williamson County* added to the finality inquiry by creating an unprecedented and qualitatively different ripeness requirement. The *Williamson County* decision states that one claiming a taking of property cannot raise the claim in federal court until she has "unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." 473 U.S. at 195. *Williamson County* pointed to a state inverse condemnation action as an example of a state compensation procedure required for ripeness. *Id.* at 196

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[4] *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J., concurring) (referring to "[t]his Court's dicta in *Williamson County*").

This was an unnecessary and counterproductive mistake. In practice, *Williamson County*'s state litigation ripeness requirement causes great harm to property owners, federal courts, and to the overall development of federal takings law. *San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J., concurring); *Wayside Church v. Van Buren County*, 847 F.3d 812, 825 (6th Cir. 2017) (Kethledge, J., dissenting) ("[I]f anyone has undermined the adjudication of federal takings claims . . . it is the federal courts—by the application of *Williamson County*."). Though the requirement is framed as a means to ensure that takings claims arrive in federal courts in a ripe state, 473 U.S. at 185, it undermines this goal in application. *San Remo*, 545 U.S. at 351 (Rehnquist, C.J. concurring). Litigating for just compensation in state court does not ripen federal judicial review of a takings claim; it bars that review. This is because the state court action triggers claim and issue preclusion barriers at the federal court that prevent it from hearing a takings claim related to the prior suit. *San Remo*, 545 U.S at 342-45. While a takings claim may be "ripe" in federal court after a property owner litigates in state court under *Williamson County*, it is also dead on arrival due to preclusion rules. *Id.*; *see* *also Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1410 (2016) (Thomas, J., dissenting from denial of cert.) (*Williamson County* "dooms plaintiffs' efforts to obtain federal review of a federal constitutional claim.").

Williamson County's effect in closing off the federal courts to federal takings claims is contrary to *Williamson County*'s intent and irreconcilable with Congress's desire to create a federal forum for federal claims through 42 U.S.C. § 1983 and 28 U.S.C. § 1331. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 542-43 (1972) (confirming that federal courts have jurisdiction over federal property rights claims raised under 42 U.S.C. § 1983). But the requirement's harmful impacts do not stop there.

Since *Williamson County* bars federal adjudication of takings claims, property owners must file Fifth Amendment takings claims in state court or not at all. Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. Chi. L. Rev. 553, 605 (2012) ("State courts thus get first bite at these [takings] actions under *Williamson County*—and they get the only bite under *San Remo*."). Yet, including a federal claim in a state court complaint allows the government defendant to remove the case to a federal court under 28 U.S.C. § 1441. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997). In the federal forum, the removed claim is unripe because removal prevented the plaintiff from completing the state litigation required by *Williamson County*. The removed takings claim instantly goes from ripe (in state court) to nonjusticiable (in federal court) and is subject to outright dismissal or remand to state court. *Reahard v. Lee County*, 30 F.3d 1412, 1414 (11th Cir. 1994) (appellate court finds a removed takings claim unripe under *Williamson County* after the claim was fully litigated on the merits in the district court, nullifying a $700,000 compensatory award). In this scenario, *Williamson County* prevents takings litigation in federal *and* state court.

The jurisdictional pitfalls created by the state litigation requirement are sufficient to condemn the rule as an unworkable and unacceptable ripeness concept. But the doctrine is also deeply flawed at a theoretical level because it rests on an incorrect view of the role of the Just Compensation Clause in takings litigation. Contrary to *Williamson County*'s assumptions, a takings lawsuit does not rest on a violation of the "without just compensation" language in the Just Compensation Clause. 473 U.S at 195. It asserts that a government act must be recognized as a *de facto* taking, and that the Just Compensation Clause provides *a federal damages remedy* in that event. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S 304, 315-16 (1987). The Clause operates as a takings remedy, not as an element of a claim and, as a result, it does not bear on the question of whether a takings claim is fit for review. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984) (The "owner has a right to bring an 'inverse condemnation' suit . . . on the date of the intrusion[.]").

Williamson County's state litigation doctrine fails to serve a ripeness purpose, causes tremendous harm to takings litigation in application, and is inconsistent with the remedial role of the Just Compensation

Clause. For all these reasons, the Court should remove the doctrine and thereby restore the prior "final decision" ripeness regime. *See San Remo Hotel*, 545 U.S. at 348-52 (Rehnquist, C.J, concurring). Stare decisis policies do not counsel against this result; they favor it. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (abrogating "unworkable" and "poorly reasoned" rules serves the principles underlying the doctrine of stare decisis).

Under the traditional "finality" inquiry, compensation remedies are irrelevant to the ripeness determination. Physical and regulatory takings claims become ripe—in federal or state court—when the government carries out an act, or arrives at a definitive regulatory position, that causes clear injury to property rights. *Williamson County*, 473 U.S. at 192. Ms. Knick's takings claims are justiciable under this framework. The Township formally enacted the Ordinance more than five years ago. Its plain terms authorize public and local governmental access to any land with a burial ground, and the Township has made clear that these provisions apply to Ms. Knick's property. JA at 20-24.

The Township's demand that Ms. Knick open her land to the public causes immediate and serious harm to her constitutionally protected right to exclude strangers. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (The "right to exclude" is "a fundamental element of the property right."). Nothing more needs to occur before a court can apply this Court's physical takings precedent and declare that the Ordinance causes a taking requiring just compensation. *Nollan*, 483 U.S at 842 ("[I]f [the state] wants an easement . . . it must pay for it."); *Kaiser Aetna*, 444 U.S at 180. When this occurs, the Township may rescind the Ordinance's access provisions to minimize its compensatory duty or pay full compensation to sustain the Ordinance as written. *First English*, 482 U.S at 321. In all events, Ms. Knick is entitled to a hearing on the merits of her takings claims.

ARGUMENT

I

WILLIAMSON COUNTY'S STATE LITIGATION REQUIREMENT IS UNWORKABLE IN PRACTICE AND INCONSISTENT WITH THE REMEDIAL NATURE OF THE JUST COMPENSATION CLAUSE

A. Background Takings Law

1. Condemnation and Inverse Condemnation

The Fifth Amendment to the Constitution provides: "nor shall private property be taken for public use, without just compensation." This amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315; *Eastern Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring) (The Clause permits "the government to do what it wants so long as it pays the charge.").

A taking of private property may occur, within the meaning of the Fifth Amendment, in several different ways. *See Kirby*, 467 U.S. at 4-5. The most straightforward situation occurs when the government institutes eminent domain proceedings in a court of law. In such proceedings, the government declares its intent to take property and deposits funds to guarantee payment of just compensation. *See Kirby*, 467 U.S. at 4-5; 40 U.S.C. § 3114(a). Assuming the validity of the public use, the only disputed issues relate to how and when the affected owner will receive just compensation. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 374-75 (1945) (in the eminent domain context, "the problem involved is the ascertainment of the just compensation required by the Fifth Amendment"); 40 U.S.C. § 3114(c)(1) ("Compensation shall be determined and awarded in the proceeding and established by judgment."). In these cases, the Just Compensation Clause functions predominately as a condition on the government's power to complete eminent domain proceedings. A taking is final and legitimate when the owner receives adequate compensation. *Danforth v. United States*, 308 U.S. 271, 284-85 (1939) ("[T]itle does not pass until compensation has been ascertained and paid . . . ."); *First English*, 482 U.S at 320 (in "condemnation proceedings[,] a taking does not occur until compensation is determined and paid").

The same is true in a quasi-condemnation case, where a legislative body "enacts a statute appropriating the property . . . [while] setting up a special procedure for ascertaining, after the appropriation, the compensation due to the owners." *Kirby*, 467 U.S. at 5; *see also Sweet v. Rechel*, 159 U.S. 380, 399 (1895) ("[I]t is a condition precedent to the exercise of [the taking] power that the statute [authorizing a taking] make provision for reasonable compensation."). In such cases, takings liability is undisputed. The essence of a "takings" claim in this scenario is that the government has failed to comply with its admitted compensatory duties. *See Cherokee Nation v. S. Kansas Ry. Co.*, 135 U.S. 641, 659 (1890).

2. Inverse Condemnation Takings Claims Concern Liability; The Just Compensation Clause Provides a Remedy

The government can also take property without using a formal condemnation procedure. It can do so, for instance, through administrative and legislative acts that, while not explicitly designed to appropriate property, cause an impact creating a taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-42 (2005). Regulatory action causes a *per se* taking when it authorizes a "physical invasion" of property, *id.* at 538, such as through imposition of an easement. *Kaiser Aetna*, 444 U.S. at 180 ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation.").

When a property owner believes that an intrusion into her property, or a restriction on its use, causes a taking, the owner is entitled to sue in an "inverse condemnation" action to establish the existence of a taking. *Kirby*, 467 U.S. at 5; *United States v. Clarke*, 445 U.S. 253, 257 (1980) ("The phrase 'inverse condemnation' . . . [is] a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.").

In such a suit, the central allegation is that the government is liable for a "taking" in a constitutional sense: "The issue is not the same in condemnation cases and in inverse condemnation cases. In condemnation cases the issue is damages: How much is due the landowner as just compensation? In inverse condemnation the issue is liability: Has the government's action effected a taking of the landowner's property?" *Am. Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 369 (9th Cir. 1981); *Henderson v. City of Columbus*, 827 N.W.2d 486, 489 (Neb. 2013) ("[T]he initial question is whether the governmental entity's actions constituted the taking or damaging of property for public use.").

In inverse condemnation cases, the Just Compensation Clause supplies a damages remedy once a court finds that a government act amounts to a taking. *First English*, 482 U.S. at 315-16; *Murr v. Wisconsin*, 137 S. Ct. 1933, 1951 (2017) (Roberts, C.J., dissenting) ("[I]f 'private property' has been 'taken,' the last item of business is to calculate the 'just compensation' the owner is due."). The Clause guarantees indemnification in the event the government takes property without formally condemning it. *Id.*; *see also Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893). In *First English*, the Court sharply confirmed this remedial reading. There, the United States argued that the Just Compensation Clause "is only a limitation on the power of the Government to act, not a remedial provision" authorizing "money damages." 482 U.S. at 316 n.9. The Court rejected this interpretation, holding that the Clause requires a "compensation remedy" "in the event of a taking." *Id.* at 316.

In short, an inverse condemnation suit challenging an injury to property seeks to establish a right to the damages remedy supplied by the Just Compensation Clause by establishing the existence of a taking. *Id.*

B. Takings Ripeness Doctrine

1. Finality Rules Controlled Prior to *Williamson County*'s Articulation of the State Litigation Doctrine

This Court has made clear that courts cannot adjudicate inverse condemnation takings claims until it is plain the claims are ripe for review. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735-38 (1997) (reviewing cases). The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). It is "also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.*

The Court has implemented these polices in the takings context by requiring plaintiffs to refrain from asserting a claim until a governmental action limiting property rights is concrete and final. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (holding that a property owner had to pursue "administrative solutions" that might reduce the impact of property restrictions to ripen a takings claim); *San Remo Hotel*, 545 U.S. at 346-47 ("It was settled well before *Williamson County*" that a regulatory takings claim "'is not ripe until the government entity charged with implementing the regulations has reached a final decision[.]'" (quoting *Williamson County*, 473 U.S. at 186)).

In *Williamson County*, the Court confirmed and elaborated on the finality ripeness doctrine. The case arose when a developer asserted that land use regulations took its property by temporarily depriving it of economically viable use. 473 U.S. at 186-90. A jury found the defendant liable for a taking and awarded monetary compensation to the developer. The Sixth Circuit upheld the jury decision on appeal. This Court subsequently granted certiorari to decide "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Id.* at 185. Yet, the Court concluded that it could not reach that issue because the underlying takings claims were unripe. *Id.*

In addressing the ripeness issue, the *Williamson County* Court reiterated that a regulatory takings claim is premature until the government reaches a "final decision" applying its regulations to the plaintiff's property. *Id.* at 186-94. The Court explained that, to obtain a final agency decision, a claimant must normally pursue any discretionary procedure within the regulatory scheme that might allow the government to soften the challenged regulations. *Id.* at 191-92.

However, the Court emphasized that finality ripeness doctrine does not require a takings claimant to exhaust state remedies:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy . . . .

473 U.S at 192-93. The Court ultimately held that the takings claimant in *Williamson County* had not obtained a final agency decision because it had not applied for variances that might have allowed the defendant to permit more use of the subject property. *Id.* at 191.

Under the traditional finality concepts affirmed in the initial portion of *Williamson County*, state takings remedies are not pertinent to the determination of whether a takings claim is ripe. 473 U.S at 192-93; *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 997-99 (1st Cir. 1983) (rejecting an argument that the takings claimant had to use "their local remedies, judicial and administrative," because "there is no requirement of exhaustion of administrative remedies in section 1983 actions."); *Foster v. City of Detroit*, 405 F.2d 138, 144 (6th Cir. 1968) (holding, in a takings case, that "a party may normally resort to a federal court without having first exhausted the judicial remedies of the state courts"' (quoting 1A James Wm. Moore, et al., Moore's Federal Practice, P0.201, p. 2023 (1961))); *Archer Gardens, Ltd. v.*

Brooklyn Ctr. Dev. Corp., 468 F. Supp. 609, 613 (S.D.N.Y. 1979) (holding a takings claimant did not need to exhaust state remedies). If a government agency makes a formal and final decision harming property, the owner may sue to establish that it is a taking warranting a compensation remedy under the Just Compensation Clause. *Kirby*, 467 U.S. at 5.

2. *Williamson County*'s State Litigation Dicta

The Court's application of the final decision rule to the claim in *Williamson County* should have ended the case. Yet, in dicta, and without adequate briefing from the parties,[5] the *Williamson County* Court went on to articulate a second, novel ripeness barrier: the state litigation requirement.

The Court started with the observation that the Just Compensation Clause "proscribes" takings "without just compensation." 473 U.S. at 194. From there, it proposed that the Clause does not "require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Id.* (citations omitted). This led the Court to conclude that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Id.* at

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[5] *See* Brief Amicus Curiae of Western Manufactured Housing Communities Association at 5-8 (discussing the nature of party briefing in *Williamson County* and the Solicitor General's introduction of the ripeness issue in an amicus brief).

194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984)). This ultimately meant "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. The Court held that the claim in *Williamson County* was unripe under the new principle because the plaintiff had not filed an inverse condemnation suit—a judicial action—under Tennessee law in Tennessee state court. *Id.*

In *San Remo*, the Court treated *Williamson County's* second ripeness requirement as a command that property owners seek compensation through state court litigation. *San Remo Hotel*, 545 U.S. at 342; *id.* at 349 (Rehnquist, C.J., concurring). At the same time, four Justices of the Court criticized the principle and suggested it should be overruled. 545 U.S. at 349 (Rehnquist, C.J., concurring). They were correct.

C. The State Litigation Requirement Is Incapable of Coherent and Just Application

The *Williamson County* Court apparently believed that adding the state litigation requirement to the pre-existing "final decision" ripeness inquiry would render takings claims fully mature for review in federal court. 473 U.S. at 197. But after more than 30 years in application, it is clear it does no such thing. In practice, the requirement entirely bars takings litigants from federal court, frustrates their access to state court, and generally turns an attempt to establish a compensable taking into a chaotic, self-defeating, and wasteful endeavor. *San Remo Hotel*, 545 U.S. at 350-52 (Rehnquist, C.J., concurring). It should not continue to exist.

1. The State Litigation Rule Ripens Nothing, but Instead Strips Federal Courts of the Ability To Hear Takings Claims

The state litigation doctrine's most startling effect is to ban property owners from asserting their federal constitutional rights in federal court. This outcome arises from the interplay between a plaintiff's compliance with *Williamson County*'s state litigation rule and the Full Faith and Credit Act. On the one hand, *Williamson County* declares that property owners may claim a taking in federal court after a state court denies them compensation. 473 U.S. at 194-96. On the other hand, res judicata and issue preclusion rules arising from the Act prevent federal courts from hearing a case related to a previously litigated dispute. *McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984); *San Remo*, 545 U.S. at 336 & n.16.

The result is that, when a property owner unsuccessfully pursues a claim for compensation in state court to comply with *Williamson County*, the claim is *barred* from federal court, not ripened. *See San Remo*, 545 U.S. at 346-47; *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of cert.); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 519-20 (6th Cir. 2004); *Trafalgar Corp. v. Miami County Bd. of Comm'rs*, 519 F.3d 285, 287 (6th Cir. 2008) (Because "the issue of just compensation under the Takings clause . . . was directly decided in a previous state court action, it cannot be re-litigated in federal district court.").

> Although the *Williamson* line of cases that requires the property owner to seek compensation in the state courts speaks in terms of "exhaustion" of remedies, that is a misnomer. For if . . . the property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit . . . by virtue of the doctrine of res judicata . . . .

Rockstead v. City of Crystal Lake, 486 F.3d 963, 968 (7th Cir. 2007); *see also W.J.F. Realty Corp. v. Town of Southampton*, 220 F. Supp. 2d 140, 146 (E.D.N.Y. 2002).

In application, the state litigation rule does the opposite of what *Williamson County* claims it will do. *DLX*, 381 F.3d at 518 n.3 (*Williamson County* "clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court."). Utilization of state compensation procedures prevents, rather than secures, federal jurisdiction over takings claims. Given this outcome, lower courts have aptly described *Williamson County*'s doctrine as a "catch-22,"[6] and a "trap."[7] The doctrine lures property owners to file state court suits that defeat, rather than ripen, federal review of their takings claims. "Like a tomato that suffers vine rot, [the claim] goes from being green to mushy red overnight. It can never be eaten."[8]

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[6] *Santini v. Connecticut Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 127 (2d Cir. 2003).

[7] *DLX*, 381 F.3d at 518 n.3 (referring to the "*Williamson* trap" created in connection with res judicata); *see also* Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse In Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 103 (2000).

In the 2005 *San Remo Hotel* case, the Court considered the conflict between the state litigation requirement and preclusion doctrines. The Court recognized that takings claims "ripened" through state court litigation normally cannot be raised in federal court, contrary to *Williamson County's* intent and language, due to preclusion rules. 545 U.S. at 346-47. Nevertheless, the *San Remo Hotel* Court refused to create an exception from these preclusion rules, such as one that would allow takings plaintiffs to "reserve" (protect) their federal claim for federal review while litigating in state court. The Court also refused to overrule the state litigation rule because that question was not properly presented. *Id.* at 352 (Rehnquist, C.J., concurring).

San Remo Hotel thereby solidified *Williamson County's* state litigation ripeness doctrine as a complete barrier to prosecution of federal takings claims in federal court. 545 U.S. at 349-52 (Rehnquist, C.J., concurring). There is no indication that the *Williamson County* Court intended to foreclose federal judicial review of takings claims, *DLX*, 381 F.3d at 518, and yet, that is the inevitable and ongoing result of the state litigation doctrine. *Foster v. Minnesota*, No. 17-1177, 2018 WL 1881609, at *2 (8th Cir. Apr. 20, 2018) ("When a property owner has unsuccessfully asserted a Fifth Amendment takings claim in state court, as Foster did . . . her later assertion of the same claim in federal court is precluded . . . .").

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[8] Thomas Roberts, *Ripeness and Forum Selection in Land-Use Litigation, in Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas* 68 (ABA, Callies ed., 1996).

2. The State Litigation Doctrine Is Inconsistent With 42 U.S.C. § 1983 and 28 U.S.C. § 1331

It is impossible to reconcile *Williamson County's* relegation of takings claims to state courts with Congress's intent to provide a federal forum for federal civil rights claims under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. *See* 28 U.S.C. § 1343(a)(3). This Court has repeatedly emphasized that the "purpose [of enacting § 1983] was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *see also Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 504 (1982) ("Congress intended . . . to throw open the doors of the United States courts to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, and to provide these individuals immediate access to the federal courts . . . ." (quotations & citations omitted)). Neither Congress nor this Court has ever carved out an exception from these federal jurisdictional grants for takings claimants or property owners more generally. *Lynch*, 405 U.S. at 542-43 ("This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction.").

By denying a federal forum to property owners claiming a "taking" of property under the Fifth Amendment, the *Williamson County* doctrine radically departs from the congressionally mandated framework for litigating constitutional rights. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 726 (Feb. 2008) (requiring state exhaustion represents "a marked change from past practice" in which "the federal government assumed primary responsibility for the enforcement of civil rights"). While one may not have a right to a federal forum after filing a prior, similar suit in state court, *San Remo Hotel*, 545 U.S. at 347, the idea that an entire class of constitutional plaintiffs can be shut out of federal courts in the first instance is unknown to constitutional doctrine. *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (Section 1983 affords "a federal right in federal courts."); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 65 (1928) (After passage of 28 U.S.C. § 1331, federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, laws, and treaties of the United States.").

No other type of constitutional plaintiff faces such a stern barrier to federal court access. *Arrigoni*, 136 S. Ct. at 1411. While some plaintiffs may face hurdles similar to *Williamson County*'s initial, "final decision" requirement, none confront a broadly applicable exhaustion of state remedies requirement that prevents access to federal courts. *See Zinermon v. Burch*, 494 U.S. 113, 124-39 (1990) (state remedies may be required only in the rare procedural due process case where it is not feasible for the government to provide pre-deprivation process); *DLX, Inc.*, 381 F.3d at 521 ("[O]ther § 1983 plaintiffs do not have the requirement of filing prior state-court actions . . . ."). This confirms the unusual nature of the state litigation rule and gives substance to the recurring complaint that *Williamson County* reduces property owners to second-class citizens in the protection of their rights. *San Remo Hotel*, 545 U.S at 351 (Rehnquist, C.J., concurring) (questioning "why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive"); *see also* Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 332-33 (1998) (The *Williamson County* doctrine shows the "constitutional rights of landowners as not quite deserving of a full measure of judicial protection, on par with other constitutional rights.").[9]

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[9] The status of federal courts is also diminished by application of the state litigation rule, as it renders them subservient to state courts in the development of Fifth Amendment takings law. This too is inconsistent with long-standing precedent. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 284-85 (1913) (rejecting an argument that federal courts cannot decide a due process property deprivation claim until state courts act, in part because it would "cause the state courts to become the primary source for applying and enforcing the constitution of the United States in all cases covered by the [Fourteenth] Amendment"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344-50 (1816) (defending primacy of federal review of constitutional issues to avoid state court bias and to ensure uniformity of decision making).

3. The State Litigation Requirement Deprives Takings Plaintiffs of Reasonable Access to State Courts

In *San Remo Hotel*, the Court seemed to believe that takings claimants at least have prompt access to state courts under *Williamson County*'s state litigation doctrine. *San Remo Hotel*, 545 U.S. at 346. But, in practice, this is not true. State court access is also often illusory due to a conflict between compliance with the state litigation rule and the government's right to remove certain state court cases to federal court under 28 U.S.C. § 1441. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.).

Since property owners cannot file a Fifth Amendment takings claim in federal court as an initial matter under *Williamson County*, and cannot sue in that forum after a failed state court proceeding due to preclusion rules, they are forced to file Fifth Amendment claims in state court or not at all. *Rockstead*, 486 F.3d at 968. Yet, doing so sets the case up to be removed to federal court under 28 U.S.C. § 1441 on the basis that it raises a "federal question." *International College of Surgeons*, 522 U.S. at 164 (affirming removal of a complaint including a takings claim). Filing a federal takings claim in state court allows the government to drag it right back to federal court, where the claim is unripe under *Williamson County* because state compensation procedures remain unexhausted. A properly filed and ripe state court takings claim instantly becomes unripe due to a defendant's unilateral choice to remove. *8679 Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569, 2010 WL 3521952, at *5-6 (E.D. Cal. Sept. 8, 2010) ("Although the claim was ripe when it was originally filed in state court, it became unripe the moment that Defendants removed it.").

When federal courts confront a removed takings claim, they are often compelled to dismiss the claim as unripe for lack of compliance with *Williamson County's* state litigation requirement. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (affirming dismissal of a removed takings claim for failure to exhaust state court procedures); *Clifty Properties, LLC v. City of Somerset*, No. 6:17-41, 2017 WL 4003024 (E.D. Ky. Sept. 11, 2017) (a takings claim is removed twice and dismissed twice under *Williamson County*).[10] The removed takings plaintiff is thus left without reasonable access to either the state *or* federal forum. The takings claim cannot be raised as an initial matter in federal court, it cannot be adjudicated in state court because of removal, and it cannot be litigated in federal court after removal due to *Williamson County*. This outcome is striking—and emblematic of the state litigation doctrine's wholly unworkable character—because it arises from perfect compliance with the doctrine. By filing in state court, the takings plaintiff did exactly what is required to secure a hearing on a takings claim. *San Remo Hotel*, 545 U.S. at 346. Yet, through no fault of the plaintiff, the claim instantly goes from alive to dead based on a defendant's choice to remove. *Doak Homes, Inc. v. City of Tukwila*, No. C07-1148MJP, 2008 WL 191205, at *4 (W.D. Wash. Jan. 18, 2008) ("Defendants' decision to remove this case from state court effectively denied [the plaintiff] an opportunity to utilize [the state's] procedure for reimbursement, and brought a takings claim to this Court that was not ripe for review.").[11]

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[10] *See also Seiler v. Charter Tp. of Northville*, 53 F. Supp. 2d 957, 962 (E.D. Mich. 1999); *Anderson v. Chamberlain*, 134 F. Supp. 2d 156 (D. Mass. 2001) (federal nature of takings claim justified removal but state litigation ripeness rule compelled subsequent refusal to hear the claim).

In recent years, a few federal circuit courts have held that a defendant waives *Williamson County*'s state litigation rule when removing a takings claim from state to federal court. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 545-48 (4th Cir. 2013); *Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014). But, after shuffling takings claims between state and federal courts for 33 years under *Williamson County*, with judicial and litigant resources wasted and claims disappearing along the way, this bit of progress is not enough.

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[11] It is true that some federal courts will remand a removed takings claim to state court, rather than dismiss it, upon finding the claim unripe under *Williamson County*. *Del-Prairie Stock Farm v. County of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis. 2008). This outcome is of little solace to the plaintiff. That removed and remanded litigant has been involuntarily yanked from the state court—which is supposedly the only proper forum for a takings claim—to a federal court—which is not a proper forum—only to be sent back to the state court where it all began, without any hearing in the process. Through it all, valuable resources and time are wasted, allowing government defendants to prevail by attrition. *Cf. Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.").

Courts have tried for decades to apply the state litigation requirement in a rational and predictable fashion, and failed. *Arrigoni*, 136 S. Ct. at 1411-12. At this point, it is abundantly clear that *Williamson County*'s state litigation requirement does not serve a ripeness purpose or any other useful purpose in application. Instead, it demeans and diminishes rights protected by the Takings Clause, wrongly frustrates the federal courts' congressionally mandated authority to review civil rights claims, and impedes the orderly development of takings law. *See generally* Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199 (2006).

D. The State Litigation Requirement Fails To Account for the Just Compensation Clause Remedy

The state litigation requirement is not only unworkable, it suffers from significant logical flaws. *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring). In particular, it fails to account for the remedial character of the Just Compensation Clause and conflates the issues in a traditional condemnation case with those in an inverse condemnation takings case.

At the core of *Williamson County*'s reasoning is the assumption that a takings claim asserts a "violation" of the Just Compensation Clause. The

Court stated this assumption early in the *Williamson County* opinion when it noted that it would "examine the posture of respondent's cause of action . . . by viewing it as stating a claim under the Just Compensation Clause." 473 U.S. at 186. Focusing on the Clause's "without just compensation" language, the Court subsequently concluded that "no constitutional violation occurs until just compensation has been denied." *Id.* at 194 n.13. This led the Court to hold that no actionable claim exists "until the State fails to provide adequate compensation for the taking." *Id.* at 195.

The critical flaw in this reasoning is that the Just Compensation Clause does not supply the cause of action when a property owner asserts a taking in an inverse condemnation action; *it supplies the remedy*. *First English*, 482 U.S. at 315-16, 321. The cause of action is that the government has carried out an act that must be treated as a taking. The claim is not that the injury to property "violated" the Just Compensation Clause's language, but that it entitles the property owner to a damages remedy under the Clause. *Id.*; 54 U.S.C. § 100735 (allowing mining claim holders to bring an inverse condemnation action "to recover just compensation, which shall be awarded *if the court finds that the loss constitutes a taking of property compensable under the Constitution*" (emphasis added)); *see also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting); *Henderson*, 827 N.W.2d at 489 ("[A]fter it has been established that a compensable taking or damage has occurred [ ] consideration [should] be given to what damages were proximately caused by the taking.").

Contrary to *Williamson County's* assumption, a takings claim does not assert that an injury to property is constitutionally invalid because it occurred "without just compensation." 473 U.S. at 194. It seeks to show that the injury is a taking "*requiring* [the remedy of] just compensation." *Lingle*, 544 U.S. at 537; *Hodel v. Irving*, 481 U.S. 704, 713 (1987); *see also Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dissenting) ("[I]f a taking has occurred, the remaining matter is tabulating the 'just compensation' to which the property owner is entitled."). That is, at least in the inverse condemnation context, the Just Compensation Clause does not "proscribe" uncompensated takings; it provides a "self-executing" damages remedy once a court finds a taking. *First English*, 482 U.S. at 315; *id.* at 316 n.9; *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *San Diego Gas & Elec. Co.*, 450 U.S. at 658 (Brennan, J., dissenting) ("[O]nce a court finds a police power regulation has effected a 'taking,' the government entity must pay just compensation" under the Just Compensation Clause.).

The flaws in *Williamson County's* reasoning are put into further relief by considering the syllogism supporting the Court's reasoning:

> [A]ll that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just

> compensation," then the property owner "has no claim against the Government."

473 U.S. at 194-95 (citations omitted).

This rationale makes some sense in a condemnation-type dispute where the government acknowledges it is taking property and that it has a resulting compensatory duty. *Kirby*, 467 U.S at 5. Such was the case in *Cherokee Nation*, from which the Court derived the foregoing logic. *Williamson County*, 473 U.S. at 194 (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974) (quoting *Cherokee Nation*, 135 U.S. at 659). In *Cherokee Nation*, the United States statutorily authorized a physical invasion of property, while providing a procedure in that same act for affected owners to obtain compensation for that taking. The Nation asserted that the taking was invalid because it had not been paid before the invasion of its property. The dispute accordingly centered on the provision of just compensation. The existence of a taking was not at issue. The Court held the Nation had no claim for a constitutional violation because the act authorizing the taking created an adequate process for it to "obtain" compensation. *Id.*

The same rationale is inapt when a dispute is about whether a taking has occurred in the first place and a property owner sues in an inverse condemnation action to litigate that issue. *First English*, 482 U.S. at 315-16; *see also Clarke*, 445 U.S. at 258. In these cases, the property owner has no right to just compensation—or to use an existing process for obtaining it—until the owner first proves that liability for a compensable taking exists. *First English*, 482

U.S at 316. *Williamson County* essentially holds that one must try to collect a compensatory debt before there is entitlement to it. 473 U.S at 195. That is wrong. The entitlement must first be established, and proof of that entitlement—not proof a violation of the Just Compensation Clause—is the essence of a takings claim. *See, e.g.*, *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 29 (2012) ("[T]he Commission filed the instant lawsuit . . . claiming that the temporary [flood-causing] deviations from the Manual constituted a taking of property that entitled the Commission to compensation."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) ("[T]he question [is] whether a minor but permanent physical occupation of an owner's property . . . constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments."); *San Diego Gas & Electric*, 450 U.S. at 660 (Brennan, J., dissenting) ("[T]he landowner must be able meaningfully to challenge a regulation that allegedly effects a 'taking,' and recover just compensation if it does so.").[12]

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[12] *Williamson County*'s failure to fully grasp this point is evident in its conclusion that one can ripen a federal takings suit by filing a state inverse condemnation action. Like inverse condemnation suits generally, a state inverse condemnation procedure is a process for proving *a taking* that warrants a damages remedy. *See* 26 Pa. Cons. Stat. § 502(c) (outlining Pennsylvania's inverse condemnation process); *Henderson*, 827 N.W.2d at 489. In essence, *Williamson County*'s doctrine declares that one must try and establish a taking (in a state inverse condemnation action) before asserting a taking (in a federal inverse condemnation action). This confirms that takings claims hinge on an allegation

Once the nature of an inverse condemnation takings action and the remedial role of the Just Compensation Clause is understood,[13] it is clear that the use of compensation procedures is not an element of a takings claim, as *Williamson County* presumed.[14] 473 U.S at 196. State compensation procedures are simply an *alternative remedy* to the Just Compensation Clause. As such, they do not play into

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that an act *causes a taking*, not that it occurred without a compensatory procedure.

[13] In the *Williamson County* Court's defense, the remedial nature of the Just Compensation Clause in regulatory takings cases was not established at the time of the decision. On two occasions before *Williamson County*, the Court tried to decide whether the Clause functions as a damages remedy, but found the issue unripe. *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980); *San Diego Gas & Electric Co.*, 450 U.S. at 633. In *Williamson County*, the Court granted certiorari to address the issue but, of course, it failed to reach it, too. 473 U.S. at 185. The Court finally addressed the remedial question head-on in *First English*, two years after it issued the *Williamson County* opinion. 482 U.S. at 310-12. There, a majority confirmed that the Just Compensation Clause is a self-executing damages remedy in the inverse condemnation context. *Id.* at 315-16.

[14] Even if one accepts the *Williamson County* premise rejected here—that an inverse condemnation claim rests on a "violation" of the Just Compensation Clause—the state litigation ripeness requirement is not a correct deduction from this premise. Accepting the premise for the sake of argument, the issue of whether an alleged taking is "without just compensation" and "complete" would depend on the actions of the responsible government entity at the time of the taking, not on the actions of a state court. If an agency charged with taking property fails to provide or guarantee compensation at the time of the property injury challenged as a taking, the alleged taking would be "without just compensation." A claim would be complete and ripe for review at that point under *Williamson County*'s own logic, regardless of what a state court might do.

a property owner's ability to assert an actionable takings claim. *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 n.6 (2013) ("[W]hether an alternative remedy exists does not affect the jurisdiction of the federal court" to hear an otherwise ripe takings claim.); *Zinermon*, 494 U.S. at 124 ("[O]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983."); Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 989-90 (1986) ("No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked.").[15]

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[15] The *Williamson County* Court attempted to buttress the state litigation requirement by analogizing to *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981). Yet, neither decision supports *Williamson County*'s logic. *San Remo*, 545 U.S. at 349 n.1 (Rehnquist, C.J., concurring). The claimant in *Monsanto* did not seek just compensation for a taking; it sought to enjoin a federal statute. In rejecting that relief, the Court did not find the claim unripe; it held it unavailable. Moreover, *Monsanto* did not rule that a property owner must exhaust some preliminary judicial process to ripen a takings claim seeking just compensation in the Court of Federal Claims. 467 U.S. at 1016-17. It held that an owner may directly file such a takings claim. *Id.*

Parratt held that a prisoner challenging a negligent loss of personal property could not state a procedural due process claim until he used available state post-deprivation remedies. 451 U.S. at 541. The Court reasoned that the asserted due process injury was not complete "unless or until the state fails to provide an adequate postdeprivation remedy for the property loss." *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984). *Parratt* applies only to "a random and unauthorized" deprivation of property, 451 U.S.

II

THE COURT SHOULD RECONFIRM THE PRE-*WILLIAMSON COUNTY* FINALITY RIPENESS FRAMEWORK AND HOLD MS. KNICK'S CLAIMS RIPE UNDER THAT REGIME

In light of the state litigation requirement's harmful impacts and flawed logic, the Court should abrogate the requirement and return takings ripeness doctrine to the framework that existed prior to *Williamson County. San Remo*, 545 U.S. at 348 (Rehnquist, C.J., concurring); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (A rule that is "not correct when it was decided, and it is not correct today . . . ought not to remain binding precedent.").

Abandoning the dysfunctional and illogical state litigation requirement does not leave property owners free to raise unripe takings claims. Takings claimants must still assert claims that are factually developed and nonspeculative. But the identification of ripe claims does not depend on whether the state has a general process for remedying a taking of private property. It depends on whether the government has

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at 541, for which the government cannot plausibly provide pre-deprivation process. It is accordingly inapplicable to deprivations of property arising from official policies or formal administrative actions, since pre-deprivation process can be provided in that context. *Id.*; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982). Since takings claims arise only from official policies and formal decision making, *Palazzolo*, 533 U.S. at 620, *Parratt*'s reasoning is inapposite to the takings context. The analogy to *Parratt* also fails because the Just Compensation Clause is remedial in nature, unlike the Due Process Clause construed in *Parratt*.

inflicted concrete harm to private property interests. *Blanchette v. Connecticut General Ins. Corporations*, 419 U.S. 102, 138-44 (1974); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990).

Ms. Knick's claims, which allege that the Ordinance effects a physical taking of private property on its face and as-applied to her particular parcel of land, are ripe under traditional and correct ripeness principles.

A. Takings Claims Ripen When the Government Clearly Injures Property Interests

In the absence of *Williamson County*'s state litigation doctrine, the ripeness inquiry in takings cases properly focuses on whether the issues relevant to takings *liability* are postured for review. 473 U.S. at 191 (explaining that the "final decision" ripeness requirement ensures that a court can apply regulatory takings tests to decide if a taking occurred); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."). The considerations relevant to determining whether the government has caused a taking are generally fit for review once the government arrives at "a definitive position" that inflicts "an actual, concrete injury" to property. *Williamson County*, 473 U.S. at 193; *Lujan*, 497 U.S. at 891.

Just compensation issues raise remedial concerns that do not affect the issue of takings liability or a court's ability to decide that question. *Tahoe-Sierra*

Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 n.17 (2002) ("In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word 'taken.'"); *Suitum*, 520 U.S. at 747 (Scalia, J., concurring) ("[A] cash payment from the government would not relate to whether the regulation 'goes too far' (*i.e.*, restricts use of the land so severely as to constitute a taking.")). Thus, when the government causes concrete harm to property without initiation of condemnation proceedings—whether through enactment of a law that burdens property or conclusive application of an existing regulation—an affected property owner may assert that the result is a compensable taking. *Horne*, 569 U.S. at 525; *Kirby*, 467 U.S. at 5 (The "owner has a right to bring an 'inverse condemnation' suit . . . on the date of the intrusion" into property.); *see also Clarke*, 445 U.S. at 258 ("When a taking occurs by physical invasion [as opposed to one by formal condemnation] . . . the usual rule is that the time of the invasion constitutes the act of taking, and '[i]t is that event which gives rise to the claim for compensation . . . .'" (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958))).

This injury-based ripeness inquiry may vary slightly depending on the type of alleged taking.[16] *See*

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[16] The ripeness inquiry may be more intensive when a case involves a regulatory takings claim. In this context, a "final agency decision" may not exist until the property owner exhausts administrative procedures that allow the government to clarify the scope and effect of its regulations. *Palazzolo*, 533 U.S. at 620. This rule arises from the nature of regulatory takings analysis.

generally Brubaker Amusement Co., Inc. v. United States, 304 F.3d 1349, 1357-59 (Fed. Cir. 2002) (summarizing finality ripeness rules). But in no case must the claimant prove that state remedies will not provide compensation before suing to establish a taking. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe*, 365 U.S. at 183; *see also Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on [§ 1983] . . . we have not required exhaustion of state judicial or administrative remedies . . . ."); *Home Tel. & Tel. Co.*, 227 U.S. at 284-85.

B. Ms. Knick's Physical Takings Claims Are Ripe

Ms. Knick alleges that the Ordinance causes a taking of private property because it (1) allows "the general public to enter, traverse, and occupy [ ] private land," including her parcel, and (2) "authoriz[es] the Township's 'Code Enforcement Officer [and] agents'" to enter, traverse, and occupy any private property to look for a cemetery. JA at 102, ¶¶ 36-37. These requirements sanction an invasion of her land for public use and eviscerate her

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473 U.S at 192. A court cannot determine how far a regulation goes in restricting the use and value of property until the government uses its discretion to arrive at a definitive position on the application of its regulation. Once it does so, 533 U.S. at 620, or it becomes clear that the agency lacks discretion to soften the regulations, *Suitum*, 520 U.S. at 739, or "the permissible uses of the property are [otherwise] known to a reasonable degree of certainty," *Palazzolo*, 533 U.S. at 620, finality exists, and a regulatory takings claim is ripe.

"fundamental right to exclude others." *See* JA at 102, ¶ 39; *see generally Kaiser Aetna*, 444 U.S. at 180. Ms. Knick accordingly claims that the Ordinance causes a taking entitling her to "compensatory damages." JA at 103, ¶ 43. Under the correct analytical framework, these claims are ripe.

1. Ms. Knick's As-Applied Claims Are Ripe

A claim that regulatory action causes a compensable physical taking is ripe once the government determines that its regulations require an invasion of property.[17] *Blanchette*, 419 U.S. at 143 (takings claim ripe where "the conveyance [of [property] allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative"); *see also Horne*, 569 U.S. at 525 (claim ripened by a "final agency order imposing concrete fines and penalties" due to a property owner's refusal to convey property to the government).

Here, the Township conclusively decided that the Ordinance's property access provisions apply to Ms. Knick's land. JA at 111-12; *cf. Suitum*, 520 U.S. at 739 (claim ripe where a government agency decided the plaintiff's land was within a restricted development zone). The Township inspected (trespassed on) the property and then sent Ms. Knick written notification that her land contains a burial site subject to the Ordinance. JA at 110-12. The Notice declares that she is "in violation of section # 5 . . .

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[17] Unlike in the regulatory takings context, a property owner asserting a physical takings claim need not pursue administrative variances that might reduce the scope of an invasion, since a physical invasion of any size is a taking of property. *Tahoe-Sierra*, 535 U.S. at 322.

which requires that all cemeteries within the Township shall be kept open and accessible to the general public during daylight hours." JA at 110-11. Finally, it orders her "to make access to the cemetery available to the public during daylight hours." *Id.* at 111. It states that she is subject to civil penalties for every day she fails to comply with this public access order. *Id.* at 111-12.

The application of the Ordinance to Ms. Knick's property is sufficiently final and concrete to allow a court to decide whether it causes a physical taking of her property. *Horne*, 569 U.S. at 525. In the event the district court finds that the Ordinance renders the Township liable for a taking, "the compensation remedy [afforded by the Just Compensation Clause] is required," entitling Ms. Knick to damages for the duration of the taking.[18] *First English*, 482 U.S at 316.

2. Ms. Knick's Facial Claims Are Also Ripe

A claim asserting that a law or regulation takes private property on its face ripens at the time of enactment. *Hodel, Inc.*, 452 U.S. at 297; *Suitum*, 520 U.S. at 736 n.10; *Keystone Bituminous Coal Ass'n v.*

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[18] Ms. Knick's claims are ripe even if one concludes, as *Williamson County* wrongly does, that a claim ripens upon a "violation" of the "without just compensation" language in the Just Compensation Clause. This is because the Ordinance contains no provision for compensation, the Notices of Violation offer no compensation, and the Township took no other steps to guarantee compensation when it ordered Ms. Knick to open her land to the public. The Township's actions accordingly should be deemed "without just compensation" and actionable, without use of state procedures, even under *Williamson County*'s (incorrect) treatment of the "without just compensation" language as an element of a takings claim, rather than as a remedy.

DeBenedictis, 480 U.S. 470, 494 (1987). The logic is straightforward. When the government passes a law that plainly and immediately restricts property interests, the burden on property is apparent. There is nothing uncertain about the impact of such law. Without more, a court can determine if that impact rises to the level of a taking requiring compensation. While a plaintiff may face a "battle" to prevail in such a facial challenge, *Hodel*, 452 U.S. at 296-97, no principle of ripeness bars the claim.[19]

There is no dispute that the Township formally enacted the Ordinance six years ago, and it remains on the books today. The Ordinance requires that all private burial areas "shall be kept open and accessible to the general public during daylight hours." JA at 22. It further authorizes Township officials to "enter upon any property within the Township for the purposes of determining the existence of and location of any cemetery . . . ." *Id.*

There is also nothing speculative about these provisions. The Township acknowledges that the first provision creates a public access easement on all private property containing a burial ground. JA at 126. The second is a broad "authorization to conduct searches of privately owned property." Pet. App. A at 19-20. Ms. Knick's land is currently subject to these access requirements, and thus, there is a clear injury to her property warranting legal action. *Blanchette*, 419 U.S. at 143.

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[19] If a court finds that a law causes a taking on its face, the initial remedy is a declaration to that effect. The government then has the option to amend or rescind the law or to pay compensation to affected property owners to retain the law. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (When an act "reaches a certain magnitude . . . there must be an exercise of eminent domain and compensation to sustain the act.").

Yet, as things stand now, Ms. Knick's only hope for a hearing is to wait for the Township to institute a state law civil enforcement action or to file a second, "inverse condemnation," action in state court.[20] In the meantime, under the threat of large, accumulating daily fines, Ms. Knick must allow anyone to enter her land, with no legal limits on where or how they enter or how long they remain and no way to determine if their presence is consistent with the Ordinance. JA at 126-27.

Ripeness doctrine does not demand this situation. Given the Township's decisive enactment and implementation of its Ordinance's access provisions, Ms. Knick has a ripe claim that the provisions effect a taking by depriving subject landowners of the fundamental right to exclude strangers. Ms. Knick need not utilize an alternative state compensation process before seeking (1) a declaration that the Township is taking property and must pay compensation to sustain the Ordinance and (2) damages under the Just Compensation Clause in the event the Township chooses to retain the

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[20] Notably, an inverse condemnation action in Pennsylvania state court would not raise different takings issues than those presented here. Such a suit would require the state court to apply this Court's takings precedent to decide if a taking occurred, the same task presented by Ms. Knick's federal complaint. The state court is not better suited to this job than a federal court. *San Remo Hotel*, 545 U.S. at 350-51 (Rehnquist, C.J., concurring). In any event, ripeness principles do require resort to state court. *See Horne*, 569 U.S. at 526 n.6.

Ordinance. *Horne*, 569 U.S. at 526 n.6; *see also First English*, 482 U.S. at 321.

C. Stare Decisis Does Not Bar the Court from Correcting Course

The Township will likely argue that the Court cannot reach the foregoing conclusions because the doctrine of stare decisis prevents it from abandoning *Williamson County*'s state litigation rule. It does not. Stare decisis is neither an "inexorable command," *Lawrence*, 539 U.S. at 577, nor "a mechanical formula of adherence to the latest decision," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). This is especially true when considering dicta. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (The Court is not "bound by dicta should more complete argument demonstrate that the dicta is not correct.").

Stare decisis also has less force when dealing with a constitutional rule, *see United States v. Scott*, 437 U.S. 82, 101 (1978), as it "is practically impossible" to correct such a rule by legislative action. *Payne*, 501 U.S. at 828 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932)). The doctrine is similarly weakened in the context of procedural rules, because such rules generate fewer reliance interests than substantive legal standards. *Alleyne v. United States*, 570 U.S. 99, 119 (2013) (stare decisis has less application with respect to "procedural rules . . . that do not govern primary conduct and do not implicate the reliance interests of private parties").

When a constitutional or procedural rule is erroneous and "unworkable," stare decisis concerns "carry little weight." *Federal Election Comm'n v.*

Wisconsin Right To Life, Inc., 551 U.S. 449, 501 (2007); *Swift & Co., Inc. v. Wickham*, 382 U.S. 111, 116 (1965) ("[O]nce [a procedural rule] is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great."). Indeed, in such a situation, "[a]brogating the errant precedent, rather than reaffirming or extending it, [ ] better preserve[s] the law's coherence and curtails the precedent's disruptive effects." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 378-79 (2010) (Roberts, J., concurring).

The state litigation requirement is dicta that purports to be a constitutionally based procedural rule. *Cf United States v. Gaudin*, 515 U.S. 506, 521 (1995). It is mistaken in theory and unworkable in application. *Payne*, 501 U.S. at 828. Given its procedural nature and unpredictable application, the state litigation ripeness doctrine gives rise to few reliance interests. That some government defendants may hope to continue defeating takings claims through procedural attrition rather than on the merits is not the type of reliance concern that supports stare decisis. Nor is the mere fact that *Williamson County*'s state litigation principle has survived to date. *See, e.g., Lingle*, 544 U.S. at 544 (abrogating a 25-year-old takings standard due to its doctrinal flaws). In light of these realities, stare decisis cannot save the state litigation requirement. *Gaudin*, 515 U.S. at 521 ("[*S*]*tare decisis* cannot possibly be controlling" when considering a "manifestly erroneous," constitutionally based procedural rule.).

Abrogating the state litigation requirement to return ripeness doctrine to the preexisting finality-based inquiry is the correct result. The Court should take that step. *Davis v. Mills*, 194 U.S. 451, 457 (1904) (The Constitution is "intended to preserve practical and substantial rights, not to maintain theories."). It should then hold Ms. Knick's takings claim ripe under the proper inquiry and remand for further litigation in federal court.

CONCLUSION

The Court should overrule *Williamson County*'s state litigation requirement, vacate the judgment below and remand for further proceedings.

DATED: May, 2018.

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IN THE

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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July 2018

QUESTION PRESENTED

Congress created a cause of action in 42 U.S.C. § 1983 to redress "the deprivation" under color of state law "of any rights, privileges, or immunities secured by the Constitution." In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court adhered to longstanding precedent and rejected a property owner's Section 1983 claim because the owner had not been deprived of its constitutional right to recover "just compensation" for "private property * * * taken for public use." U.S. Const. Amend. V.

The question presented is whether to overrule *Williamson County* and reinterpret Section 1983 to provide a cause of action to a person alleging a deprivation of private property, but not a deprivation of the constitutional right to recover just compensation for that property.

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PROVISIONS INVOLVED

Pertinent provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution, 42 U.S.C. § 1983, 26 Pa. Cons. Stat. (Pa. C.S.) §§ 102, 302 and 502, and 9 Pa. C.S. §§ 702 and 703 are reproduced at Appendix 1a–7a, *infra*. The Ordinance of the Township of Scott, Pennsylvania, Relating to the Operation and Maintenance of Cemeteries and Burial Places is reproduced at J.A. 20–24.

INTRODUCTION

This Court granted review to reconsider *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). *Williamson County* held that, if a person whose property is taken for public use retains the right to recover just compensation for the taking by way of an inverse-condemnation proceeding in state court, she cannot press a claim under 42 U.S.C. § 1983 that is premised on a violation of the Just Compensation Clause. That holding is sound and should be reaffirmed.

Petitioner challenges remarkably little of *Williamson County*'s reasoning. She accepts that the Just Compensation Clause does not require that compensation be paid in advance of or contemporaneously with a taking. And, outside of a pair of footnotes buried in her brief—not nearly enough to sustain an attack on precedent—petitioner accepts that an inverse-condemnation remedy in state court is a constitutionally sufficient means to provide just compensation. She further concedes that such a remedy was available to her in this case, and that she did not pursue it. In short, petitioner does not and could not argue that her constitutional right to recover compensation was violated.

The only question remaining for this Court to decide is whether petitioner must allege a violation of that right in order to proceed under Section 1983, the sole cause of action that she pleaded. The correct answer follows from the plain text of that statute, which provides a remedy only for "deprivation[s]" of "rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. A long and unbroken line of this Court's precedent limits the Section 1983 cause of action to persons alleging violations of federal rights, and there is no good reason to depart from that construction—and powerful reasons to adhere to it.

This Court's decision in *Williamson County* did not single out property rights for disfavored status. It simply applied the general Section 1983 rule to the Just Compensation Clause right. There can be no violation of that right—and thus no claim under Section 1983—if a reasonable, certain, and adequate postdeprivation remedy exists in state court. If such a remedy is available to her, a plaintiff cannot manufacture a constitutional violation by refusing to pursue that remedy. That is exactly what petitioner tried to do in this case, and the courts below properly rejected her Section 1983 claim. This Court should affirm.

STATEMENT

A. Legal Background

1. This case concerns the interplay of the Fifth and Fourteenth Amendments with Section 1983. The Fifth Amendment's Just Compensation Clause bars the federal government from taking private property for public use without just compensation. The Fourteenth Amendment applies that same prohibition to state action. And Section 1983 supplies a remedy for unconstitutional action under color of state law.

a. The Fifth Amendment does not categorically prohibit the government from depriving a person of property, but it gives the owner two rights in relation to such a deprivation. The Due Process Clause confers the right to contest the lawfulness of the deprivation, while the Just Compensation Clause confers the right to recover compensation for a lawful deprivation of property for public use.

The Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. That Clause protects persons not from the deprivation, but from the "*erroneous*[]" deprivation, of property. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004). Due process entitles a person who disputes the "underlying validity" of the government action depriving her of property to have its lawfulness probed by a neutral adjudicator. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). The property owner may argue in such a proceeding that the deprivation was unlawful on any number of grounds—including that the government did not put the property to public use. *E.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005).

The inquiry guaranteed by the Due Process Clause "is logically prior to and distinct from the question whether [a deprivation of property] effects a *taking*" compensable under the Just Compensation Clause. *Lingle*, 544 U.S. at 543 (emphasis added). Because "[n]o amount of compensation can authorize" an "impermissible" deprivation of property, a claim for just compensation "presupposes" that the deprivation is justified. *Ibid.* The Just Compensation Clause accordingly does not secure a right to private property simpliciter, but rather a "'right to recover just compensation'" for an "otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315

(1987) (*First English*) (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

This basic understanding of the Just Compensation Clause—that it concerns *lawful* property deprivations—underlies "the entire doctrine of inverse condemnation," *First English*, 482 U.S. at 316, whereby the government takes private property for public use, with just compensation to be awarded later in a judicial proceeding instituted by the owner. This Court has long endorsed inverse-condemnation proceedings as "reasonable, certain, and adequate provision[s] for obtaining [the] compensation" that the Fifth Amendment requires for lawful deprivations of property. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). See also *Reg'l Rail Reorganization Cases*, 419 U.S. 102, 124–25 (1974); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Crozier v. Krupp*, 224 U.S. 290, 306–07 (1912).

b. For nearly a century, courts played a limited role in administration of the Just Compensation Clause. Congress had not waived federal sovereign immunity to suits for compensation, and the Clause, like other provisions of the Bill of Rights, did not apply to the States. See *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833).

Congress initially paid just compensation by private bill, but that model proved unworkable. See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 637–51 (1985). In 1855, the Court of Claims was created "for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims." *United States v. Klein*, 80 U.S. 128, 144 (1871). The new court promptly took jurisdiction over inverse-condemnation suits against the United States, *e.g.*, *Wirt v. United States*, 6 U.S. Cong. Rep. C.C. 172 (1858), but its judgments remained subject to legislative review. Then, in 1866, Congress exited the field by making judgments of the Court of Claims final and appealable to Article III courts. Act of Mar. 17, 1866, c. 19, § 1, 14 Stat. 9. Congress thereby realized the vision of James Madison, author of the Just Compensation Clause, who recognized that investigating claims against the government and ascertaining just compensation "part[ook] strongly of the judicial character" and called for "impartial[]" arbitrators whose rulings could be appealed to this Court. Annals of Cong., 1st Cong., 1st Sess. 638 (1789).

Two months after completing the switch to a judicial model for paying compensation under the Fifth Amendment, Congress submitted the Fourteenth Amendment to the States for ratification. By that time, the States had adopted just-compensation clauses in their own constitutions, and many state legislatures already were directing claims for compensation to state courts. See, *e.g.*, *Gilmer v. Lime Point*, 18 Cal. 229, 260 (1861); *City of Pittsburgh v. Scott*, 1 Pa. (1 Barr.) 309, 314–16 (1845); *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 16–17 (N.Y. Ct. Err. 1837). Cf. *Newcomb v. Smith*, 2 Pin. 131, 134 (Wis. 1849) (holding that an inverse-condemnation remedy in territorial court guaranteed the right secured by the Fifth Amendment). In short, the judicial model was established at both the federal and the state levels by the time the Fourteenth Amendment was ratified in 1868.

c. The Fourteenth Amendment incorporated the protections of the Just Compensation Clause against the States. See U.S. Const. Amend. XIV, § 1. In *Chicago, B. & Q. Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897), this Court held that the Fourteenth Amendment's Due Process Clause "requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State." *Id.* at 235. The Fourteenth Amendment places the same condition on a State's power to take property that the Fifth Amendment places on the federal power. *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156–57 (1919).

The Fourteenth Amendment grants Congress the "power to enforce" its terms "by appropriate legislation." U.S. Const. Amend. XIV, § 5. Congress exercised that power to pass the Enforcement Act of 1871, 17 Stat. 13, Rev. Stat. § 1979, which provides "a cause of action for violations of the Constitution" by persons acting under color of state law. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). Section 1 of that statute, codified as amended at 42 U.S.C. § 1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects * * * any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.[1]

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[1] The Enforcement Act originally protected only rights secured by the Constitution, but, in 1874, its reach was extended to rights secured by other "laws." 42 U.S.C. § 1983. See *Chapman*, 441 U.S. at

A local government is a "person" subject to liability under Section 1983, *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978), and many States vest local governments with the power to take property for public use. If an exercise of that power is unaccompanied by a reasonable, certain, and adequate provision for compensation, Section 1983 lets the property owner pursue damages "for the unconstitutional denial of such compensation." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999). The federal district courts have original jurisdiction over those claims. 28 U.S.C. §§ 1331, 1343(a)(3).[2]

2. *Williamson County* addressed whether a property owner may press a Section 1983 claim if "a State provides an adequate procedure for seeking just compensation" that the owner has not followed. 473 U.S. at 195. This Court held that a Section 1983 claim does not lie in that instance because the plaintiff is not "depriv[ed] of [the] right * * * secured by" the Just Compensation Clause, 42 U.S.C. § 1983, namely, the right to a reasonable, certain, and adequate procedure to recover just compensation.

The property owner in *Williamson County* was a developer whose preliminary plats for a subdivision were disapproved by a planning commission chartered under

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608. Petitioner does not invoke any rights-creating statute, so the discussion in this brief is limited to rights secured by the Constitution.

[2] In 1875, Congress granted the lower federal courts jurisdiction over all claims "arising under the Constitution or laws of the United States," subject to an amount-in-controversy requirement. Judiciary Act, ch. 137, § 1, 18 Stat. 470 (Mar. 3, 1875), codified as amended at 28 U.S.C. § 1331. A century later, Congress eliminated that requirement, see Pub. L. No. 96-486, § 2, 94 Stat. 2369 (1980), thereby rendering superfluous the separate grant of jurisdiction over claims "[t]o redress the deprivation under color of [state law], of any right, privilege, or immunity secured by the Constitution." 28 U.S.C. § 1343(a)(3).

Tennessee law. 473 U.S. at 181. The developer "did not then seek variances that would have allowed it to develop the property according to its proposed plat," *id.* at 188, nor did it "bring an inverse condemnation action to obtain just compensation for an alleged taking" by the commission, as "allow[ed]" under state law. *Id.* at 196. Instead, the developer sued the commission in federal court "pursuant to 42 U.S.C. § 1983, alleging that the commission had taken its property without just compensation." 473 U.S. at 182.

A jury awarded the developer damages for a taking of its property. 473 U.S. at 183. The district court granted judgment to the commission notwithstanding the verdict, but the court of appeals reversed and reinstated the jury award. *Ibid.* This Court granted certiorari to consider whether "Governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Id.* at 185. But "the procedural posture" of the plaintiff's Section 1983 "cause of action" kept the Court from reaching that question. *Id.* at 176, 186.

This Court ruled that the property owner's Section 1983 claim was "premature" and "not yet ripe," for two independent reasons corresponding to the two segments of the Just Compensation Clause. ***Williamson County***, 473 U.S. at 194, 197. First, the Court could not discern whether property had been *taken* for public use because the plaintiff "ha[d] not yet obtained a final decision regarding the application of [state law] to its property." *Id.* at 186. Because the commission might yet have issued variances that "would allow [the plaintiff] to develop the subdivision in the manner [it] proposed," *id.* at 193, it was "impossible to determine the extent of the loss or interference" with property rights. *Id.* at 191 n.12. The Court thus held that it could not entertain a Section 1983 claim absent the commission's "final, reviewable decision." Petitioner embraces this holding of *Williamson County*. Pet. Br. 10.

The "second reason" why the property owner could not proceed under Section 1983 was that it had not tried to obtain *just compensation* "through the procedures the State ha[d] provided for doing so." *Williamson County*, 473 U.S. at 194. This Court observed that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Ibid.* The Court then took note of the well-established principle that "all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Ibid.* (quoting *Reg'l Rail Reorganization Cases*, 419 U.S. at 124–25). It followed that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause" if she has not "used the procedure and been denied just compensation." *Id.* at 195. Because a "constitutional violation" is the *sine qua non* of a Section 1983 claim, the Court held that a property owner could not "bring[] a § 1983 action" in lieu of "utiliz[ing] procedures for obtaining compensation." *Id.* at 194 n.13.

To fortify that conclusion, the Court pointed to its decisions rejecting Section 1983 claims where plaintiffs alleging violations of the Due Process Clause had not utilized constitutionally sufficient postdeprivation remedies. *Williamson County*, 473 U.S. at 195 (citing *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984)). Those precedents rested on the fact that "the State's action [wa]s not 'complete' in the sense of causing a constitutional injury" remediable under Section

1983 "'unless or until the state fail[ed] to provide an adequate post-deprivation remedy for the property loss.'" *Ibid.* (quoting *Hudson*, 468 U.S. at 532 n.12). Likewise, the Court observed, if a State fulfills its constitutional duty to afford the property owner a reasonable, certain, and adequate mechanism to obtain compensation for a taking, the same completeness principle defeats a Section 1983 claim by an owner who did not invoke that mechanism. *Ibid.*

3. a. The Pennsylvania General Assembly has developed a "complete" procedure, 26 Pa. C.S. § 102(a), to provide "just compensation," *id.* § 701, to any person whose property is taken "by authority of [state] law for a public purpose." *Id.* § 103. That procedure governs claims alleging takings under either the Just Compensation Clause or its counterpart in the Pennsylvania Constitution, Art. I, § 10, which "is interpreteted using the same standards and framework" as the federal provision. *Pa. Workers' Comp. Judges Prof'l Ass'n v. Exec. Bd.*, 39 A.3d 486, 496 (Pa. Commw. Ct. 2012). Petitioner has not pressed any claim under the Pennsylvania Constitution.

A Pennsylvania property owner who alleges that a *lawful* government action has interfered with her ownership rights to the point of "taking" her property has six years to petition the county Court of Common Pleas for "the appointment of viewers to ascertain just compensation." 26 Pa. C.S. § 502(a)(6). See *id.* § 502(c)(1); 55 Pa. C.S. § 5527(a)(2). An owner who alleges that she was *unlawfully* deprived of property may invoke the equity jurisdiction of the same court "to force the [alleged taker] to file a declaration of taking which [the property owner] may then challenge through preliminary objections." *Blair Twp. Water & Sewer Auth. v. Hansen*, 802 A.2d 1284, 1289 (Pa. Commw. Ct. 2002). See 26 Pa. C.S. §§ 302, 306. If the challenge to the lawfulness of the government action is sustained, the court may vacate that action and "revest[]" title in the private owner. 26 Pa. C.S. § 306(f)(1). Otherwise, the court "determine[s] whether a condemnation has occurred" and enters a final and appealable order on the question of liability. *Id.* § 502(c)(2); Pa. R. App. P. 311(e).

If property *was* taken, the Court of Common Pleas selects three county residents—including an attorney, 26 Pa. C.S. § 503(2)—from the Board of Viewers, "an established and experienced panel of experts" funded by the County. *Commonwealth ex rel. Kelley v. Cantrell*, 193 A. 655, 659 (Pa. 1937). See 42 Pa. C.S. §§ 2412, 3544(a)(1)(i). After those experts "view the premises, hold [public] hearings," 26 Pa. C.S. § 504(a)(1), and receive testimony from "qualified valuation experts," *id.* § 1105, they "file a report" proposing a compensatory award. *Id.* § 512. That award is incorporated into a final judgment of the court, *id.* § 518, unless the property owner objects to it, in which case she may ask the judge or a jury to recalculate just compensation *de novo* after visiting the premises and hearing from other experts. *Id.* § 1103. Every compensation award includes interest calculated from the date of the taking, *id.* § 713, as well as "reimbursement of reasonable appraisal, attorney, and engineering fees and other costs and expenses actually incurred." *Id.* § 709. Courts have uniformly held that Pennsylvania's regime "provides adequate process for plaintiffs to obtain just compensation." *Chainey v. Street*, 523 F.3d 200, 223 (3d Cir. 2008).

b. This case involves a cemetery in rural Pennsylvania. The Commonwealth, like many other States, and "with a refined and elevated sense of what is due to both the dead and the living, regards the resting-place of the dead as hallowed ground—not subject to the laws of ordinary property." *Brown v. Lutheran Church*, 23 Pa. (11 Harris) 495, 500 (1854). Pennsylvania common law provides that "the ground once given for the interment of a body is appropriated for ever to that body." *Brendle v. German Reformed Congregation*, 33 Pa. (9 Casey) 415, 422 (1859). That ancient rule is based in "human rather than in property values." Percival E. Jackson, *Law of Cadavers and of Burial and Burial Places* 377 (1950). See also Gaius, *Commentaries*, trans. J.T. Abdy et al. 69 (1870) (reciting Roman law that "conveying a corpse into a place" rendered the ground *divini juris*, a place of the gods and "the property of no one"). Yet the burial right also gives rise to a singular interest in real property—an implied "perpetual servitude or easement" that protects both "the repose of the ashes of the dead, and the religious sensibilities of the living," "who may visit the spot in future generations." *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 584–85 (1829).

Cemetery access is a core component of this distinctive property right. If human remains are buried on private property, the common law curtails the "law[] of ordinary property," *Brown*, 23 Pa. at 500, that otherwise entitles the owner to exclude others. See generally Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. Rev. 1469, 1473–93. In some States, the only beneficiaries of the right to visit cemeteries are the next-of-kin of the deceased, see *id.* at 1479, but Pennsylvania courts have not imposed that restriction. Cf. *St. Peter's Evangelical Lutheran Church v. Kleinfelter*, 8 Pa. D. & C. 612, 614 (Pa. Ct. Com. Pl. 1926) (holding that "any * * * person of the community" may enforce the public interest in cemetery preservation).

The Pennsylvania General Assembly recently codified the common law by unanimously enacting a statute providing that every "individual has a right to reasonable access for visitation to a burial plot" on private property. Act of Dec. 21, 2017, Pub. L. No. 1205, No. 64, § 2, codified at 9 Pa. C.S. § 702(1). That right of "reasonable access" to gravesites carries forward the common law, which had allowed "reasonable and usual enjoyment" of cemeteries by the general public. Jackson, *supra*, at 373. See also *McDonald v. Monongahela Cemetery Co.*, 55 Pitts. 385 (Pa. Ct. Com. Pl. 1908), aff'd, 75 A. 38 (Pa. 1909); 14 Am. Jur. 2d *Cemeteries* § 39 (1964) ("Persons entitled to visit, protect, and beautify graves must be accorded ingress and egress from the public highway next or nearest to the cemetery, at [r]easonable times and in a reasonable manner."). The statute clarifies that it is "reasonable" for a homeowner with a cemetery on her property to "designate the frequency, hours, and duration of visitation," 9 Pa. C.S. § 703(e), or to establish "prearranged times for visitation and the methods of ingress and egress to the burial plot." *Id.* § 703(d). Pennsylvania long has given its townships power to "make rules and regulations regarding the location, operation and maintenance of cemeteries" to "secure the health, safety, and welfare of the citizens of the township." 53 Pa. C.S. §§ 65607(1), 66536(a).

B. The Present Controversy

1. In 2008, petitioner, for nominal consideration, acquired from her sister "approximately 90 acres" of farmland in the Township of Scott, Pennsylvania. Pet. App. B2. See also J.A. 147 (deed). The property contains petitioner's "primary residence, as well as farmland and grazing areas for horses, cattle and other farm animals." Pet. App. B2. It also contains a cemetery in which her neighbors' ancestors allegedly are buried. See *id.* at A4; J.A. 114, 124. Petitioner at one time disputed the existence of

this cemetery, but she now accepts it for purposes of this case. Pet. Br. 6 n.2. The cemetery sits in an "open field" beyond the curtilage of her home. Pet. App. A11.

In 2012, before the General Assembly enacted its cemetery-access statute, but against the backdrop of the common law, the Township passed an ordinance "relating to the operation and maintenance of cemeteries." J.A. 20 (capitalization altered). See 53 Pa. C.S. § 66536(a). In pertinent part, that ordinance requires landowners to adequately "maintain and upkeep" cemeteries and not "unreasonably restrict [public] access" to them "during daylight hours." J.A. 22. The Township's Code Enforcement Officer may "enter upon" private land "for the purposes of determining the existence of and location of any cemetery." *Id.* at 22–23. A landowner "found liable" for a violation of the ordinance "in a civil enforcement proceeding" is subject to a fine of between $300 and $600. *Id.* at 23.

In 2013, having been "advised by Township residents" of a noncompliant cemetery on petitioner's property, J.A. 27; see also J.A. 134, the Code Enforcement Officer visited her farm and verified "multiple grave markers/tombstones." *Id.* at 107. Finding the cemetery both inaccessible and in disrepair, the officer sent petitioner a "notice of violation" alerting her to the terms of the ordinance and directing her to maintain the cemetery properly and to permit visitors "as required by the ordinance." *Id.* at 108. The notice stated that the Township would enforce the ordinance if petitioner refused to comply. *Id.* at 109.

2. After receiving the notice, petitioner sued the Township in the Court of Common Pleas and sought an emergency injunction to set aside the ordinance on several grounds, including that it allegedly effected a "taking

without compensation." J.A. 138. See also *id.* 175–77. Petitioner also sought a declaration that the ordinance was "unconstitutional, void, ineffective and without force." *Id.* at 39. Neither her complaint nor her motion invoked the Commonwealth's inverse-condemnation procedure; petitioner did not ask the Court of Common Pleas to appoint viewers to ascertain just compensation or, in the alternative, to compel the Township to file a declaration of taking.

The state court entered a consent order whereby the Township agreed to withdraw its notice of violation and stay enforcement of the ordinance against petitioner while the court considered her requests for injunctive and declaratory relief. J.A. 178. The court later decided that the case was "not in the proper posture for a decision to be rendered on [those] forms of relief," *id.* at 5, because petitioner could not invoke equity jurisdiction to derail an enforcement action without showing irreparable harm. *Id.* at 39–40. Petitioner did not seek immediate review of that decision, *id.* at 34, nor did she amend her complaint to request a different "form of relief," *i.e.*, just compensation.

After the Code Enforcement Officer issued petitioner a second notice of violation, J.A. 110–12, petitioner moved the state court to hold the Township in contempt for violating the consent order that had temporarily stayed enforcement of the ordinance. The court denied the motion because "it was reasonable for the Township to conclude" that the denial of petitioner's motion for injunctive and declaratory relief vacated the provisional remedy. *Id.* at 26.

Petitioner's state-court suit nominally remains pending, but she has "not petition[ed] the court to initiate the process for ascertaining and awarding just compensation" under state law. Pet. App. B15. Nor has the Township or any other party sued to enforce the cemetery ordinance.

3. While her contempt motion was pending in state court, petitioner filed the instant case against respondents in the U.S. District Court for the Middle District of Pennsylvania and sought relief under Section 1983.

a. Petitioner initially alleged that the "enactment and enforcement of" the Township's cemetery ordinance violated her constitutional rights under the Fourth, Fifth, and Fourteenth Amendments. J.A. 42. When the Township moved to dismiss her complaint, petitioner amended it and added an alleged First Amendment violation. *Id.* at 47. The Township again moved to dismiss, and the district court granted that motion because petitioner "failed to adequately state claims for violations of her constitutional rights under § 1983." *Id.* at 42. In particular, she "fail[ed] to plead" a "plausible" claim that the ordinance had effected a "taking without just compensation." *Id.* at 77–79.

The district court gave petitioner "one [more] opportunity to * * * state a claim" upon which relief could be granted, J.A. 89, and she filed a second amended complaint that again pleaded multiple "deprivation[s] of her civil rights * * * pursuant to 42 U.S.C. Section 1983." *Id.* at 92. She still did not plead a simple claim for just compensation. The court again granted the Township's motion to dismiss for "failure to state a claim upon which relief c[ould] be granted." Fed. R. Civ. P. 12(b)(6). The court dismissed the claim that the ordinance, either "on its face" or "[a]s applied to" petitioner, infringed her constitutional right to recover compensation for a taking of property. J.A. 102–03. The court thus held that petitioner could not proceed under Section 1983 because she "ha[d] not pursued" the state's "constitutionally adequate" procedure "for obtaining just compensation." Pet. App. B14–B15.

b. The court of appeals affirmed. Pet. App. A1–A33. It first observed that "the government does not violate the Fifth Amendment simply because one of its actions 'constitutes a taking.'" *Id.* at A23 (citation omitted). Rather, a taking "simply gives rise to an unqualified constitutional obligation to compensate the property owner." *Id.* at A24 (internal quotation marks and citation omitted). The court found that obligation met here by Pennsylvania's "inverse-condemnation proceedings," which constitute "a reasonable, certain and adequate provision for obtaining compensation." *Id.* at A28. See also *ibid.* (summarily rejecting petitioner's suggestion that "a self-contained [compensatory] mechanism" must appear within the four corners of the ordinance). Because petitioner had not invoked the requisite state procedure, the court reasoned, she could not claim to have been deprived of her constitutional right to recover compensation for a taking. *Ibid.*

Petitioner argued that at least her "facial taking" claim should proceed irrespective of the availability of a state-law remedy, but the court of appeals discerned that this claim too was "unavoidably" a "claim[] for compensation." Pet. App. A26–28. "When a party challenges the fundamental validity of a law," the court explained, "the claim turns on an issue that arises logically and temporally prior to the denial of compensation" and thus does not rise or fall on the availability of just compensation. *Id.* at A24. The fate of *petitioner's* "facial" challenge, by contrast, turned on whether compensation for any taking effected by the ordinance was available through a reasonable, certain, and adequate procedure. *Id.* at A28. Petitioner did not allege that the ordinance would have been unlawful if compensation was paid. She did not, for example, allege that the Township lacked authority to enact the ordinance, or that it had "taken" her land for a reason other than "public use." U.S. Const. Amend. V. The court of appeals therefore held that *Williamson County* applied equally to her facial and as-applied claims.

The court of appeals next rejected petitioner's contention "that she exhausted state-law remedies because she sued unsuccessfully in state court." Pet. App. A28. Petitioner "d[id] not argue that inverse-condemnation proceedings would be unavailable or futile." *Id.* at A31. And, because petitioner "only sought declaratory and injunctive relief, not compensation," from the state court, she "could not have 'been denied compensation.'" *Id.* at A29.

Lastly, the court of appeals declined petitioner's invitation to "waive her failure" to pursue the State's postdeprivation remedy for "prudential" reasons. Pet. App. A30–A31. Petitioner argued that it "would be more efficient" for a federal court to entertain the Section 1983 claims now that she had filed them. *Id.* at A31. The court of appeals pointed out that this "would be true in *any* case" in which a plaintiff refused to utilize a postdeprivation remedy. *Ibid.* Allowing petitioner to proceed thus would make future plaintiffs less likely "to pursue relief through proper channels." *Id.* at A32.

SUMMARY OF ARGUMENT

The Just Compensation Clause does not confer a right to private property simpliciter; it confers the right to recover just compensation for property lawfully taken for public use. As this Court has held since the 19th century, that right is secured if the property owner has a reasonable, certain, and adequate means to recover compensation; and one such means is an inverse-condemnation suit instituted by the owner after property is taken.

Petitioner concedes that she was entitled to file an inverse-condemnation suit in state court to recover compensation for any taking of her property by the Township. And she does not and could not seriously argue that such an action is an unreasonable, uncertain, or inadequate means to recover just compensation. The two footnotes in which petitioner so suggests (Br. 38 n.14, 45 n.18) are insufficient to preserve the argument, and wholly unpersuasive in any event. In the end, petitioner candidly admits (Br. 13) that her claim against respondents "does not rest on a violation" of any federal right.

Her case thus reduces itself to the question whether a cause of action under Section 1983 lies if there has been no violation of a federal right. Congress answered that question unambiguously: To proceed under Section 1983, a person must have been "depriv[ed] of [a] right[], privilege[], or immunit[y] secured by the Constitution [or] laws." This Court accordingly has held in a variety of settings that where the infringement of a constitutional right turns on the unavailability of an adequate postdeprivation remedy—as is the case under the Just Compensation Clause—the availability of such a remedy defeats a claim pleaded under Section 1983.

In *Williamson County v. Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court correctly applied that statutory rule to the Just Compensation Clause right and held that a property owner who forgoes her right to file suit in state court to recover just compensation for a taking cannot then sue under Section 1983 and claim to have been deprived of that right. Respondents concur with the Solicitor General (Br. 19–21) that, properly understood, the holding of *Williamson*

County is grounded in the Section 1983 cause of action rather than abstract notions of "prudential ripeness." Petitioner has no cause of action under Section 1983 for the simple reason that her rights have not been infringed.

Petitioner shies away from the Section 1983 claim that she pleaded and instead hints at a possible claim seeking just compensation directly under the Fourteenth Amendment. Such a claim is not properly presented and should not be considered. That claim would not be viable anyway, for the same reason that petitioner's Section 1983 claim is not viable: Pennsylvania's adequate postdeprivation remedy ensures that the Fourteenth Amendment is not violated when property is taken for public use. This Court also need not and should not address the Solicitor General's novel and incorrect theory that all inverse-condemnation claims arising under state law in fact "arise under" federal law within the meaning of 28 U.S.C. § 1331. This Court granted review to address petitioner's "federal" claim under Section 1983, Pet. Br. i, not a state-law claim that she has never pleaded in any court.

There is compelling reason to adhere to *Williamson County* apart from its correctness. Statutory *stare decisis* is an almost categorical rule of decision, especially when the statutory scheme remains a focus of congressional attention. Legislators repeatedly have tried and failed to authorize a plaintiff in petitioner's shoes to pursue just compensation in federal court. It would be inappropriate for this Court to intercede and jettison the plain text of Section 1983—a statute that gives rise to as much litigation as any in the U.S. Code—solely to provide special treatment to a class of plaintiffs whose federal rights have not been violated and who may turn to state courts to recover just compensation for any property of theirs that has been taken. Nor should this Court step in to exempt state-court inverse-condemnation actions from the reach of the full-faith-and-credit statute, after having unanimously declined to do so in *San Remo Hotel, L.P. v. City & County of San Fransisco*, 545 U.S. 323 (2005).

Allowing state courts to decide inverse-condemnation claims against local governments in the ordinary course serves values of federalism and comity that this Court has recognized have particular force in the context of land-use regulation. State courts are not merely *adequate* forums for adjudicating those claims, they are *the best* forums for doing so. This case illustrates why. The Lackawanna County Court of Common Pleas is likely to be most familiar with the common-law right of cemetery visitation and how it maps onto the township ordinance and state statute that address the same subject. And, if any taking occurred in this case—which respondents insist it did not—then just compensation would be ascertained in the first instance by an established panel of local valuation experts retained by the state court.

Rather than cast aside that venerable Pennsylvania institution and the plain language of one of our oldest and most important civil-rights statutes, this Court should reaffirm the holding of *Williamson County* and affirm the judgment of the court of appeals.

ARGUMENT

I. *Williamson County* Was Decided Correctly

"The first inquiry in any § 1983 suit * * * is whether the plaintiff has been deprived of a right 'secured by the Constitution.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (quoting 42 U.S.C. § 1983). The Constitution does not secure an unconditional right to private property; it secures the right to recover just compensation when private property is taken for public use. A long line of precedent, not challenged by petitioner, holds that an inverse-condemnation action against the government guarantees the constitutional right to recover compensation for a taking. In *Williamson County*, this Court straightforwardly applied that precedent to hold that a property owner who forgoes an available and adequate inverse-condemnation remedy has not been deprived of any constitutional right and thus cannot proceed under Section 1983. That holding is sound and should be reaffirmed.

A. A taking of property for public use is constitutional if the owner may file an inverse-condemnation suit to recover just compensation.

1. The Just Compensation Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. Without its last three words, the Clause would outlaw eminent domain entirely and thereby threaten the "independent existence and perpetuity" of government. *Kohl v. United States*, 91 U.S. (1 Otto) 367, 371 (1875). See also *Boom Co. v. Patterson*, 98 U.S. (8 Otto) 403, 406 (1878) ("[T]he right to take private property for public uses[] appertains to every independent government."). But the restrictive phrase *without just compensation* "makes plain," *Lingle*, 544 U.S. at 536, that the Clause does not confer a right not to have one's property put to public use. It merely confers "the right to recover just compensation for property taken." *First English*, 482 U.S. at 315 (quoting *Jacobs*, 290 U.S. at 16).

A corollary to that "basic understanding" of the Just Compensation Clause, *First English*, 482 U.S. at 315, is that the Clause "presupposes" the "underlying validity" of the government action effecting the taking. *Lingle*, 544 U.S. at 543. Here, because petitioner has abandoned her challenges to the validity of the Township's ordinance, she must accept that the Township, in directing her to maintain the cemetery on her land and not unreasonably restrict visitors, lawfully exercised authority delegated by the state legislature. See Pet. Br. 6 n.2. A holding that the Just Compensation Clause *prohibited* that exercise of authority would be self-contradictory. Because the Clause applies to "otherwise proper interference[s]" with private property rights, *First English*, 482 U.S. at 315, the constitutional right it secures is the right to recover compensation if an interference amounts to a "taking."

Just like the Fifth Amendment, Section 1 of the Fourteenth Amendment secures the property owner's right to recover just compensation for a taking. Section 1 provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. One of the rights that the Fourteenth Amendment protects from state infringement is the right to recover compensation for property taken for public use. See *Chicago, B. & Q. R.R.*, 166 U.S. at 235–36. Representative John Bingham of Ohio drafted Section 1 with the Just Compensation Clause "especially in mind," *Monell*, 436 U.S. at 686, and a clear understanding that the Clause was not infringed unless the government "took property *without compensation*." Cong. Globe, 42d Cong., 1st Sess. App. 84 (1871) (Globe App.) (emphasis added).

2. This Court has held repeatedly since the 19th century that the availability of a reasonable, certain, and adequate inverse-condemnation procedure fulfills the duty

imposed by the Just Compensation Clause. See U.S. Br. 10–13 (collecting 14 cases). *Reasonable* means that the form and timing of proceedings are appropriate. *Certain* means that compensation is guaranteed if property is determined to have been taken. *Adequate* means that compensation must make the owner whole. Judicial inverse-condemnation procedures like those in Pennsylvania satisfy those three conditions.

It is *reasonable* for the government to "take land and pay for it later." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984). The term "just compensation" itself denotes a *post hoc* indemnification for property that previously has been taken for public use. See, *e.g.*, James Madison, *Property*, Nat'l Gazette, Mar. 27, 1792, reprinted in 4 *Letters and Other Writings of James Madison* (R. Worthington ed. 1884); 8 Journals of the Continental Congress 622–23 (C. Ford ed. 1907) (offering "just compensation" to owner of vessel "burnt by the enemy" while "in the public service"); 5 Journals of the Continental Congress 713 (C. Ford ed. 1906) (awarding "just compensation" for wood taken by continental army).

Predeprivation process is the norm under the Due Process Clause, which is meant to protect persons "from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). But an inverse-condemnation claim lies only when the government makes an "accurate decision" to take property for public use. *Williamson County*, 473 U.S. at 195 n.14. Because the propriety of the deprivation is uncontested, the owner's sole interest is in the money that is the full and perfect equivalent of the property taken. The owner typically will not suffer "serious harm" from a delay in receipt of those funds, because "any loss in the time value of the money can be compensated by an interest payment." *City of Los Angeles v. David,* 538 U.S. 715, 717–18 (2003). See 26 Pa. C.S. § 713.

On the other hand, requiring the government to pay compensation before it takes any action that might inferfere with property rights would cause "such delay" in achieving public goals "as would be a source of anarchy." *Louisville, C. & C. R.R. Co. v. Chappell,* 24 S.C.L. (Rice) 383, 392 (S.C. Ct. Err. 1838). "The supposedly safe and simple rule that requires in all cases the payment of compensation before entry" is utterly "impractical," Philip Nichols, *Eminent Domain* § 209, p. 633 (2d ed. 1917) (Nichols), especially for a generally applicable regulation like the one at issue here. See Pet. Br. 3 ("It is common to find private, family gravesites in the area because Pennsylvania state law allows so-called 'backyard burials.'").

The decision in *Parratt v. Taylor,* 451 U.S. 527 (1981), offers a useful "analog[y]." *Williamson County,* 473 U.S. at 195. *Parratt* held that a postdeprivation suit to recover damages for *lost* property satisfied the Due Process Clause because predeprivation safeguards could not possibly prevent the deprivation of property. Along the same lines, a postdeprivation suit to recover compensation for a "taking" satisfies the Just Compensation Clause because the property owner has no legitimate interest "in *preventing* the kind of deprivation at issue." *Zinermon v. Burch,* 494 U.S. 113, 129 (1990). That "special" feature of the Clause, *Williamson County,* 473 U.S. at 195 n.14, makes "the value of predeprivation safeguards * * * negligible," *Zinermon,* 494 U.S. at 129, just as in *Parratt.* That it does so for a different reason does not blunt the force of the analogy. Contra Pet. Br. 39 n.15.

Recovery of just compensation also must be *certain* and *adequate*, and inverse-condemnation suits again are up to the task. The owner of property taken for public use has "an unqualified right" to recover compensation that "can be enforced—that is, collected—by judicial process." *Sweet v. Rechel*, 159 U.S. 380, 403 (1895). If the alleged taker is a public entity, that condition is met by "the pledge of the good faith of the government" to pay its debts. *Crozier*, 224 U.S. at 307. See 26 Pa. C.S. § 303(b)(2) (pledging local tax revenues as "security for the payment" of just compensation). The owner also must be offered "the full and perfect equivalent of the property taken," so that she is placed "in as good position pecuniarily as [s]he would have been if h[er] property had not been taken." *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923). Inverse-condemnation judgments provide the requisite amount of compensation. See 26 Pa. C.S. § 713.

3. Petitioner does not dispute in the body of her merits brief that the Pennsylvania Eminent Domain Code armed her with a reasonable, certain, and adequate—and thus constitutionally sufficient—procedure to recover just compensation for any property that has been "taken" by the Township. Compare Pet. Br. 38–39 with Pet. 20–22. Only in a pair of footnotes does petitioner suggest that an inverse-condemnation proceeding cannot secure the constitutional right of a property owner to recover compensation for a taking. "A footnote is no place to make a substantive legal argument," *CTS Corp. v. Envt'l Prot. Agency*, 759 F.3d 52, 64 (D.C. Cir. 2014), especially one attacking a century of precedent. Petitioner's challenge to the sufficiency of Pennsylvania's inverse-condemnation process has ben abandoned and should not be considered. Cf. *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772–74 (2015). In any event, it lacks merit.

In her first such footnote (Br. 38 n.14), petitioner contends that the Constitution requires the specific governmental entity that takes the property to itself ascertain and pay just compensation. She argues that "a state court" in particular may not participate in determining liability or compensation if the court did not itself effect the alleged taking. *Ibid.* Petitioner offers no support for this proposed rule, and none exists. "[C]ourts have always been recognized as a coequal part of the State's sovereign decision-making apparatus," *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 762 n.27 (1982) (*Mississippi*), and nothing in the Constitution bars a State from assigning to its courts the task of resolving claims against itself. Cf. *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962) ("Congress may create tribunals under Article III for the sole purpose of adjudicating matters that it might have reserved for legislative or executive decision.").

There is good reason for a State to make that assignment. The federal experience has shown that vesting the political branches with responsibility for claims adjudication is inadvisable. See *supra*, pages 4–5; H.R. Rep. No. 498, 30th Cong., 1st Sess. 6 (1848) (describing legislative claims-processing as "a system of unparalleled injustice, and wholly discreditable to any civilized nation"). Property owners in particular would be disserved if their claims for compensation could not be heard in the first instance by the judiciary, the one branch of government "designed not to protect the public at large but to protect individual rights." *Fed. Elec. Comm'n v. Akins*, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting). Petitioner herself has asked a court to determine whether property was "taken" and, if so, what compensation is owed. She just does not trust a *state* court that is "bound" to make those same determinations under federal law. U.S. Const. Art. VI, cl. 2.

Petitioner's second footnote (Br. 45 n.18) argues that the government must "provide a [separate] self-contained mechanism for compensating property owners," Pet. App. A28, in every ordinance it enacts that might be held in one or more applications to "take" private property. Once again, there is no logic or precedent for that proposal. The Constitution does not mandate that "a general statute" prescribing the means to recover just compensation for *any* taking, *Sweet*, 159 U.S. at 404, be restated ad nauseam throughout state and local codebooks. It is far more "reasonable, certain, and adequate," *ibid.*, for the government to promulgate a single set of rules to process just-compensation claims. See, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (holding that the generic compensatory mechanism in the Tucker Act secured the right to recover compensation for takings arising from application of the Federal Insecticide, Fungicide, and Rodenticide Act, which had no compensatory mechanism).

In sum, the availability of an inverse-condemnation action in state court ensures that private property may be taken for public use under color of state law without violating the Constitution.

B. A plaintiff invoking Section 1983 must allege a violation of the Constitution.

1. Nearly 150 years ago, Congress passed Section 1983 for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." 17 Stat. 13. Section 1983 does not itself "provide for any substantive rights"; it serves only "to ensure that an individual ha[s] a cause of action for violations of the Constitution." *Chapman*, 441 U.S. at 617. Congress decided to limit that cause of action to plaintiffs alleging "deprivation[s]" under color of state

law "of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983.

There is no daylight between the rights secured by the Fourteenth Amendment and the rights enforceable under Section 1983. The clear purpose of that provision was "the enforcement * * * of the Constitution * * * *to the extent of* the rights guarantied * * * by the Constitution." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 934 (1982) (quoting Globe App. 81 (remarks of Representative Bingham, who drafted Section 1 of the Enforcement Act)) (emphasis added). The statute thus extends "as broad[ly] as the protection that the Fourteenth Amendment affords," but "'no further.'" *Id.* at 934 & n.17 (quoting Globe 579 (remarks of Senator Trumbell)).

Again, the right "secured by" the Just Compensation Clause, 42 U.S.C. § 1983, is not a right to retain property needed for public use; it is a right to recover just compensation if that property is taken. To prevail under Section 1983, then, a property owner must establish not merely that she was "depriv[ed] of" property, but also that the State "depriv[ed]" her of the right to recover just compensation for that property. 42 U.S.C. § 1983. That is, in a nutshell, the holding of *Williamson County*.

2. Like the property owner in *Williamson County*, petitioner pleaded her claims under Section 1983. See J.A. 100–03 (Counts I and II of operative complaint).[8] She accordingly alleged in the lower courts, and in her petition for certiorari, that the Township violated the Constitution "because it took [her] property *without compensation*."

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[8] The Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, mentioned in Count III, J.A. 104–06, merely "enlarge[s] the range of remedies available" with respect to an independent cause of action. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950).

Pet. App. A27. See also Pet. 22; J.A. 42, 57. After review was granted, petitioner reversed course and now "reject[s]" the "premise" that her Section 1983 "claim rests on a 'violation' of the Just Compensation Clause." Pet. Br. 38 n.14. See also *id.* at 13, 37. The Solicitor General also has reversed course and now argues (Br. 31) that Congress meant for Section 1983 to redress actions that "did not violate" the Constitution, but only if the plaintiff is a property owner alleging a taking for public use. 42 U.S.C. § 1983. Contra Brief of United States, *Williamson County*, O.T.1984, No. 4, pp. 16–17.

Petitioner and the Solicitor General are incorrect. The plain language of Section 1983 limits its cause of action to a person subjected to "the *deprivation* of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (emphasis added). A "deprivation" of a right is "a taking away" of that right, Worcester's Dictionary 386 (1860), or, in modern parlance, a "violation" of that right. See *Baker*, 443 U.S. at 146 ("Section 1983 imposes liability for violations of rights protected by the Constitution."). Section 1983 provides a remedy only "for *unconstitutional* state action." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 68 (1989) (emphasis added). Accord *Chapman*, 441 U.S. at 617.

The Solicitor General posits (Br. 31) that "deprivation" means something short of a violation only in "the unique context of the [Just Compensation] Clause," and that State subdivisions (but not natural "person[s]," 42 U.S.C. § 1983) can be held liable under Section 1983 for takings of property for public use that do not violate the Constitution. But it is "dangerous" to ascribe a different meaning to statutory language in its different applications, *Clark v.*

Martinez, 543 U.S. 371, 386 (2005), and it is no less dangerous to interpret Section 1983 to match the Solicitor General's "perceived 'purpose' of a constitutional provision," rather than the "actual constitutional right[]" that it confers. *Chavez v. Martinez*, 538 U.S. 760, 780 & n.2 (2003) (Scalia, J., concurring in part in the judgment).

For her part, petitioner ignores the statutory text completely and fails to observe the "strict" distinction between "a simple suit for just compensation," which does not allege a violation of the Constitution, and a Section 1983 suit, which seeks "damages for the unconstitutional denial of such compensation." *Del Monte Dunes*, 526 U.S. at 710. A suit for just compensation is premised only on the deprivation of *property* (an Article III injury, but not a constitutional violation), whereas a Section 1983 suit requires a deprivation of the *constitutional right* to recover compensation for a taking. Put another way, a suit for just compensation *secures* the constitutional right, whereas a Section 1983 action redresses a State's *failure to secure* that right. The "takings claim" that petitioner now wants to plead, Pet. Br. 35, is a simple claim for just compensation that does not allege a constitutional violation. But that claim does not sound under Section 1983.[4]

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[4] The distinction between a Section 1983 suit and a simple suit for just compensation is no mere technicality. There is "no doubt that claims brought pursuant to § 1983 sound in tort," *Del Monte Dunes*, 526 U.S. at 709, because they seek redress for personal "injuries caused by the violation of * * * legal rights." *Carey*, 435 U.S. at 257. Just-compensation claims, by contrast, *do not* sound in tort and center on injury to property. See 28 U.S.C. § 1491(a)(1) (conferring jurisdiction over claims seeking just compensation from the United States, which do "not sound[] in tort"). While not formally styled as an *in rem* proceeding, an inverse-condemnation suit filed by a property owner is animated by the same *in rem* concepts that govern a direct condem-

The dichotomy between claim-as-right and claim-as-remedy-for-deprivation-of-right is, as petitioner obliquely admits, not unique to the Just Compensation Clause. Pet. Br. 28 (citing *Zinermon*, 494 U.S. at 124–39). Its neighbor, the Due Process Clause of the Fifth Amendment, provides in parallel structure that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. A deprivation of property is perfectly constitutional if effected through due process. In some cases, "due process of law" is a state-law postdeprivation suit against the government official who deprived a person of property. *E.g.*, *Hudson*, 468 U.S. at 533; *Parratt*, 451 U.S. at 543–44; *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974). In such cases, a Section 1983 action is not "an *alternative remedy*" that itself effects due process, Pet. Br. 38, but rather an action for damages for want of due process. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 643 (1999) ("[O]nly where the State provides no remedy, or only inadequate remedies, * * * could a deprivation of property without due process result."); *Hudson*, 468 U.S. at 539 (O'Connor, J., concurring) (noting the similar relationships of the Due Process and Just Compensation Clauses to Section 1983).

The same is true of any constitutional right the infringement of which turns on unavailability of an adequate postdeprivation remedy. See, *e.g.*, *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (explaining that a plaintiff alleging a denial of her constitutional right to access the courts must "identify a remedy * * * not otherwise available in some suit that may yet be brought"); *Carter v.*

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nation suit filed by the government. See, *e.g.*, 26 Pa. C.S. ch. 5 (applying special public-notice and intervention rules to both types of suits). Those concepts are foreign to a tort suit filed under Section 1983.

Greenhow, 114 U.S. 317, 322 (1885) (rejecting Section 1983 claim alleging Contracts Clause violation because "the only right secured to" the plaintiff was "a right to have a judicial determination declaring the nullity" of a state law that impaired a contract, a remedy to which "[h]e ha[d] simply chosen not to resort"). Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (explaining that coerced testimony elicited "prior to trial may ultimately impair" the Fifth Amendment right against self-incrimination, but that no Section 1983 claim can lie unless and until testimony is used "at trial"). A violation of such a right is not "complete" if adequate postdeprivation remedies are available. *Williamson County*, 473 U.S. at 195.

Williamson County thus does not relegate "property owners to second-class citizens in the protection of their rights." Pet Br. 29. It simply places them on a par with every other plaintiff that cannot allege "the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Petitioner's position rests on "a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Allen v. McCurry*, 449 U.S. 90, 103 (1980). See Pet. Br. 28 ("[T]he idea that an entire class of constitutional plaintiffs can be shut out of federal courts in the first instance is unknown to constitutional doctrine."). But neither the Constitution nor any federal statute confers such an entitlement. *Allen*, 449 U.S. at 103. Congress limited the Section 1983 cause of action to persons alleging deprivations of their rights, and petitioner cannot escape the fact that her case "does not rest on a violation" of any right. Pet. Br. 13.

Lastly, petitioner invokes (Br. 27) the teaching of *Patsy v. Board of Regents*, 457 U.S. 496 (1982), that "exhaustion of administrative remedies in § 1983 actions should not be judicially imposed." *Id.* at 502. The plaintiff in *Patsy* alleged that her employer had violated the Equal Protection Clause of the Fourteenth Amendment by "deny[ing] her employment opportunities solely on the basis of her race and sex." *Id.* at 498. Because the alleged violation occurred at the moment she was "den[ied]" the "equal protection of the laws," U.S. Const. Amend. XIV, § 1, the plaintiff could seek relief immediately under Section 1983. Petitioner, by contrast, has not been denied any right under the Just Compensation Clause and therefore cannot state a claim under Section 1983. *Williamson County* "d[id] not engraft an exhaustion requirement upon § 1983, but rather den[ied] the existence of a cause of action," *Heck v. Humphrey*, 512 U.S. 477, 489 (1994), because "the governmental action [was] not unconstitutional." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985).

* * *

Section 1983 means what it says. A plaintiff must allege "the deprivation of" a constitutional "right" in order to state a claim. The right "secured by" the Just Compensation Clause is the right to recover compensation through a reasonable, certain, and adequate process. A plaintiff who refuses to follow such a process in state court may not use Section 1983 to obtain relief in federal court. That holding of *Williamson County* should be reaffirmed.

II. *Williamson County* Controls This Case

Like the property owner in *Williamson County*, petitioner brought suit in federal court and pleaded a Section

1983 claim premised on the Just Compensation Clause after foregoing an available state-law inverse-condemnation remedy. This Court held in *Williamson County* that a plaintiff in her situation cannot prevail on the claim that she pleaded. Petitioner opted to proceed solely under Section 1983, and this Court should not countenance her attempt (and that of the Solicitor General) to smuggle in novel and unmeritorious claims that were "not pleaded in the complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the petition for certiorari." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 n.2 (1989).

A. This Court's precedent mandates dismissal of petitioner's Section 1983 claim.

1. Petitioner disparages (Br. 22) the inverse-condemnation holding of *Williamson County* as "dicta" authored "without adequate briefing from the parties." That is wrong; it was an alternative holding of the Court. See *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) ("[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other." (internal quotation marks and citation omitted)). The property owner in *Williamson County* could not press a Section 1983 claim based on an alleged taking without just compensation because the owner had not shown *either* a taking (because it "ha[d] not yet obtained a final decision regarding the application of [state law] to its property") *or* the want of compensation (because it had not "utilized the procedures [the State] provide[d] for obtaining just compensation"). 473 U.S. at 186.

This Court's resolution of a question of law "properly presented, fully argued, and elaborately considered in the opinion" is not dictum. *Fla. Cent. Ry. Co. v. Schutte*, 103 U.S. (13 Otto) 118, 143 (1880). *Williamson County* properly presented the question whether a landowner may press a Section 1983 claim premised on a violation of the Just Compensation Clause after foregoing a State's inverse-condemnation remedy. That question was antecedent to, and thus "fairly included" within, S. Ct. R. 15.1(a) (1980), the merits question on which *certiorari* was granted, and resolution of the antecedent issue disposed of the suit. The issue was fully briefed by the parties, Brief of Respondent, O.T.1984, No. 4, pp. 37–40; Reply Brief of Petitioner, O.T.1984, No. 4, pp. 3–7, and aired at oral argument. Tr. 7, 21–22, 51–55. This Court then thoroughly considered the issue in a self-contained section of its opinion spanning four pages of the U.S. Reports. 473 U.S. at 194–97. Its resolution of the issue was assuredly a holding.

2. That holding "rest[ed] on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional," and thus cannot give rise to a Section 1983 claim. *Riverside Bayview Homes*, 474 U.S. at 128. The *Williamson County* rule has at times been misunderstood because this Court characterized the plaintiff's Section 1983 claim as "not ripe." 473 U.S. at 186. *Ripeness* is a term increasingly confined to the jurisdictional realm. See *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014). But, as the Solicitor General rightly explains (Br. 19–21), *Williamson County* rested not on "Case [or] Controversy" grounds, U.S. Const. Art. III, § 2, but on the ground that the plaintiff did not establish the elements of a Section 1983 claim. In any event, "nothing of substance" in the decision "*turned upon* whether the existence of a

cause of action was technically jurisdictional." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

Dicta in this Court's subsequent opinions has gradually unmoored the *Williamson County* rule from its statutory origins and reframed it as a "prudential ripeness" rule. *E.g.*, *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733–34 (1997). A court assessing prudential ripeness considers "whether the factual record [i]s sufficiently developed" to support judicial review and "whether hardship to the parties would result if judicial review is denied." *Susan B. Anthony List*, 134 S. Ct. at 2347. Those factors overlap to some degree with the question whether a property owner has suffered a constitutional deprivation entitling her to a Section 1983 remedy. But the inquiries are not the same, and this case presents the opportunity to return the *Williamson County* rule to its origins and clarify that it depends not on prudence, "but rather * * * whether the claim is cognizable under § 1983." *Heck*, 512 U.S. at 483. Cf. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 (2014).

3. Properly understood, *Williamson County* permits a federal court to entertain a Section 1983 claim contesting the procedural adequacy of the State's postdeprivation remedy. Such a claim would allege a deprivation of the constitutional right to a reasonable, certain, and adequate procedure to recover compensation for a taking.[5] But petitioner has not preserved any argument that Pennsylvania's inverse-condemnation procedure is deficient in any of those ways, either on its face or as applied to her.

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[5] A claim that private property was "taken," but not for "public use," U.S. Const. Amend. V, also alleges a constitutional violation and is cognizable under Section 1983 as soon as the taking occurs.

Petitioner argues (Br. 30–33) that *Williamson County* leads to unjust results where a defendant removes a state-law inverse-condemnation claim to federal court, only to contend that the availability of a state-court remedy prevents the federal court from entertaining a Section 1983 claim. But there are three different ways that such cases could, consistent with *Williamson County*, be decided in federal court. First, the government defendant could be estopped from arguing that resolution of a claim it removed to federal court must await action by the state court. Cf. *Lapides v. Board of Regents*, 535 U.S. 613, 619 (2002). Second, the federal court could hold that the defendant had violated "the Fourteenth Amendment's Due Process Clause" by "denying [a] potential litigant[] use of established adjudicatory procedures." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429–30 (1982). See also *Reich v. Collins*, 513 U.S. 106, 111 (1994) (holding that a State cannot "h[o]ld out what plainly appear[s] to be a 'clear and certain' postdeprivation remedy" and then "reconfigure its scheme, unfairly, in *midcourse*" to withdraw it); *Allen*, 449 U.S. at 101 (noting that Section 1983 provides "a federal remedy * * * where state procedural law, though adequate in theory, was inadequate in practice"). Third, the federal court could take supplemental jurisdiction over the state-law inverse-condemnation claim and decide it in the first instance. See 28 U.S.C. § 1367.

This case does not present the question which of those paths is most appropriate, but it would be extraordinary to overturn *Williamson County* on the ground that a court in a different case might misread the opinion as requiring a federal court to withhold decision in that unusual circumstance. Federal courts generally have rejected procedural shenanigans by government defendants and entertained property owners' Section 1983 claims. *E.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 563–64 (2d Cir. 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 544–49 (4th Cir. 2013). Petitioner cites a grand total of *one* case in which a federal district court wrongly refused a property owner's entreaty to adjudicate a Section 1983 claim alleging a violation of the Just Compensation Clause after the owner's inverse-condemnation claim was removed to federal court. Pet. Br. 31 n.10 (citing *Seiler v. Charter Twp. of Northville*, 53 F. Supp. 2d 957 (E.D. Mich. 1999), where the claims were remanded back to state court). An isolated misapplication of the *Williamson County* doctrine does not show that it "is incapable of coherent and just application."[6] Pet. Br. 23 (capitalization altered).

There was no procedural chicanery in this case. Petitioner had "a realistic and fair opportunity," Pet. Br. 1, to file a single action in the Court of Common Pleas disputing the validity of the Township's actions and, in the alternative, seeking compensation on takings grounds if their propriety was sustained. See *Blair Twp.*, 802 A.2d at 1289. Instead, she sought only the first "form[] of relief," J.A. 5, and respondents did not seek to remove her case to federal court. The state court's order declining to grant relief did not leave the case "in an unresolvable posture over which [she] had no control." Pet. Br. 7 n.3. Petitioner could have moved for reconsideration; moved to certify the order for immediate appeal, see Pa. R. App. P. 1311(b); or filed a praecipe for entry of an adverse judgment. See Pa. R. App. P. 301(e). Alternatively, she could have filed a new action in state court seeking an appointment of viewers to ascertain just compensation for a taking. Instead, she sued respondent in federal court claiming to have been deprived of the right that she had just declined to pursue.

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[6] There was not "perfect compliance with the doctrine" in any of petitioner's other authorities. Pet. Br. 31. In three cases, the property owner did not invoke the State's inverse-condemnation statute. *DelPrairie Stock Farm, Inc. v. County of Walworth*, 572 F. Supp. 2d 1031, 1032 (E.D. Wis. 2008); *Koscielski v. City of Minneapolis*, 393 F. Supp. 2d 811, 817–18 (D. Minn. 2005), aff'd, 435 F.3d 898 (8th Cir. 2006); *Anderson v. Chamberlain*, 134 F. Supp. 2d 156, 161–62 (D. Mass. 2001). In two cases, the property owner *asked* to return to state court rather than have a federal court adjudicate its Section 1983 claim. *Clifty Props., LLC v. City of Somerset*, No. 6:17-41, 2017 WL 4003024, at *3 (E.D. Ky. Sept. 11, 2017); *8679 Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569, 2010 WL 3521952, at *6 (E.D. Cal. Sept. 8, 2010). In another case, the property owner's Section 1983 claim was held unripe because the government "ha[d] not rendered a final decision" applying its regulation to the property. *Doak Homes, Inc. v. City of Tukwila*, No. C07-1148, 2008 WL 191205, at *3 (W.D. Wash. Jan. 18, 2008). See Pet. Br. 10 ("This traditional 'finality' ripeness regime is not challenged here."). In the final case that petitioner cites, the property owner did not plead a Section 1983 claim at all. *Reahard v. Lee County*, 30 F.3d 1412, 1414 n.3 (11th Cir. 1994).

B. Petitioner did not plead a simple claim for just compensation in federal court, and she could not have done so.

Petitioner ignores the Section 1983 claim she pleaded and hints at a different claim that she did not plead and that *Williamson County* did not expressly foreclose—a simple claim for just compensation brought directly under the Fourteenth Amendment. This Court should not consider, much less recognize, that novel claim, which has not been addressed by the courts below or any other court of which respondents are aware. For the same reasons (and more), the Court should disregard the Solicitor General's plea as *amicus curiae* to broaden the question presented to cover yet another claim that petitioner did not plead, namely, the simple claim for just compensation authorized by Pennsylvania's inverse-condemnation statute. The Solicitor General is wrong to contend that this claim would "arise under" federal law and thus fall within the statutory subject-matter jurisdiction of the federal district courts.

1. Petitioner did not plead a claim directly under the Fourteenth Amendment, and at times she disavows the existence of such a cause of action. Pet. Br. 34. But she elsewhere claims an "entitle[ment] * * * to a damages remedy," *ibid.*, on the theory "that claims for just compensation are grounded in the Constitution itself." *First English*, 482 U.S. at 315. See also Pet. Br. 39 n.13 (describing the Just Compensation Clause as "a self-executing damages remedy"). This Court need not and should not address an on-again, off-again argument based on a novel constitutional claim not presented to the courts below.

Regardless, there is no such claim. To be sure, this Court has held, "in the absence of * * * a statutory remedy" for a taking by the United States, Nichols § 490, p. 1322, that the Fifth Amendment "creates a cause of action" to recover just compensation. *United States v. Testan*, 424 U.S. 392, 401–02 (1976). See *First English*, 482 U.S. at 315 (quoting *Jacobs*, 290 U.S. at 16). But it does not follow that the Fourteenth Amendment creates a federal cause of action for compensation against a *State* in the *presence* of a statutory remedy. Only a "depriv[ation]" by a "State" of the right to recover just compensation, U.S. Const. Amend. XIV, § 1, could possibly give rise to such a claim. See *Chicago, B. & Q. R.R.*, 166 U.S. at 241.

Section 1983 itself ensures that no direct cause of action under the Fourteenth Amendment need be implied in order to vindicate a property owner's constitutional right to recover compensation for a taking. If the State does not provide a reasonable, certain, and adequate process for the owner to recover compensation for a taking, Section 1983 steps into the breach to provide a federal remedy.

One of those two "alternative remedial structure[s]" is always available, and that "alone" would defeat any nonstatutory claim that petitioner might have pleaded. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017). See U.S. Br. 27 n.8.

But petitioner did not plead such a claim, so the proper course is for this Court not to address it. The admonition that this is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), applies with heightened force to constitutional causes of action. See *Christopher*, 536 U.S. at 417. That such a cause of action would be available against "State[s]" themselves, U.S. Const. Amend. XIV, § 1, not just "person[s]," 42 U.S.C. § 1983, is all the more reason to await a case in which the question is properly presented. See U.S. Const. Amend. XI. Petitioner is "master[] of [her] complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987), and her seeming desire to revise it during proceedings before this Court is no reason to disturb the judgment of the court of appeals.

2. The Solicitor General likewise is dissatisfied with petitioner's complaint, and he invites this Court (Br. 22–27) to remand so that she can amend it a third time to add the very claim that she has steadfastly refused to pursue: a simple claim for just compensation arising under Pennsylvania law. Accepting the Solicitor General's invitation would require this Court to resolve whether 28 U.S.C. § 1331 confers jurisdiction on the federal courts to decide inverse-condemnation claims that arise under state law. That issue is not fairly included within the question presented, has never been briefed by the parties, was not addressed below, is a matter of first impression in *any* court, and raises serious constitutional and practical concerns. This Court should not address the issue under these circumstances. But, if it does so, this Court should hold that

federal courts cannot hear inverse-condemnation claims against local governments as a matter of course.

This case presents the question whether a property owner may press a "*federal* takings claim[]" after foregoing the State's inverse-condemnation remedy. Pet. Br. i (emphasis added). The question whether petitioner may pursue a *state-law* claim in federal court may be "related to the one [she] presented, and perhaps complementary to the one [she] presented, but it is not 'fairly included therein.'" *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) (quoting this Court's Rule 14.1(a)) (emphases omitted). Moreover, while "parties are not limited to the precise arguments they made below," *id.* at 534, they are limited to the precise *claims* they advanced. Petitioner does not press a state-law claim even in this Court; she mentions Section 1331 only in passing as "provid[ing] a federal forum for *federal* civil rights claims." Pet. Br. 27 (emphasis added). It would be unprecedented to consider a wholly new claim raised only by an *amicus curiae* in circumstances where this Court "would apparently be the first court in the Nation to determine," *Yee*, 503 U.S. at 538, whether every inverse-condemnation claim pleaded under state law "aris[es] under" federal law. 28 U.S.C. § 1331.

Regardless, the Solicitor General is wrong. As a general matter, "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.). The federal "arising under" jurisdiction thus excludes claims arising under state law, save for "a 'special and small category' of cases," *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citation omitted), that "a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable &*

Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005). Consistent with the Fourteenth Amendment, Congress in 1871 approved a balance that gave the federal courts authority to entertain claims that local governments *violated* the Constitution. See 42 U.S.C. § 1983. But that "usual constitutional balance," *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1574 (2016), would be upset if federal courts routinely were to adjudicate state-law causes of action against local governments for actions that *do not violate* the Constitution or any other federal law. Cf. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 160 (1997) (holding that Section 1331 conferred jurisdiction on a federal district court over a state-law claim alleging a "taking of property *without just compensation*" (emphasis added)).

Given the "tremendous number" of inverse-condemnation claims filed against local governments nationwide, *Grable*, 545 U.S. at 318, only a clear statement of legislative intent could justify such a result. But there is no evidence whatsoever that the 43d Congress—which first conferred general federal jurisdiction over claims arising under federal law—intended to unravel the delicate balance that the 42d Congress had struck in Section 1983. See Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470 (Mar. 3, 1875).

III. This Court Should Adhere To *Williamson County*

"[T]his Court does not overturn its precedents lightly," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014), and there is no "special justification" for doing so in this case. *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989). The Court follows an "almost categorical rule of stare decisis in statutory cases," *Rasul v. Bush*, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting), and it should decline petitioner's invitation to transform "the meaning and coverage of one of our oldest civil rights statutes" solely to allow property owners to forum shop. *Patterson*, 491 U.S. at 168. *Williamson County* "does not * * * preclude Congress from allowing just compensation claims to be brought in federal court," U.S. Br. 30 n.9, but Congress has chosen not to do so, repeatedly rebuffing efforts in recent years to expand Section 1983 to cover plaintiffs in petitioner's shoes. Its decision to leave Section 1983 intact honors the constitutional values of federalism and comity by leaving Pennsylvania and other States free to apply their time-tested compensatory mechanisms.

A. Congress has declined to grant a federal remedy to property owners whose constitutional rights have not been violated.

From the time it first confronted Section 1983, this Court has understood that a constitutional violation triggers that cause of action. See *Carter*, 114 U.S. at 322. That understanding "ha[s] not eroded over time." *Kimble v. Marvel Enter., LLC*, 135 S. Ct. 2401, 2410 (2015). See, *e.g.*, *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012). "[A] whole web of precedents" is grounded in that understanding of Section 1983, *Kimble*, 135 S. Ct. at 2411, and uprooting it would have serious consequences that are hard to predict.

Revisiting the trigger for a Section 1983 claim would be particularly inappropriate here, where legislators have shown a "willingness to consider" amending the statute to single out property owners for special treatment. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014). Three times in the past two decades, the House of Representatives has passed legislation designed to broaden Section 1983 to encompass simple claims for just compensation brought against local governments. H.R. 4772, 109th Cong., 2d Sess., § 5 (Sept. 29, 2006); H.R.

2372, 106th Cong., 2d Sess., § 2 (Mar. 16, 2000); H.R. 1534, 105th Cong., 2d Sess., § 2 (Feb. 26, 1998). The failure of that legislation to attract support from the Senate is not a good reason for this Court to depart from the settled construction and plain text of the statute that Congress enacted in 1871, in compliance with the Constitution's bicameralism and presentment requirements.

Williamson County does not, as petitioner contends (Br. 29 n.9), render federal courts "subservient to state courts in the development of Fifth Amendment takings law." Property owners may invoke the diversity or supplemental jurisdiction of the federal courts in appropriate cases. See 28 U.S.C. §§ 1332(a), 1367.[7] Furthermore, review of federal questions in state-court judgments is available in this Court, which is the ultimate guarantor of "orderly development of takings law." Pet. Br. 33. See 28 U.S.C. § 1257(a). The Constitution does not require more.

Petitioner protests that, once the state court decides an inverse-condemnation claim, a Section 1983 claim is "dead on arrival" in federal court due to the federal full-faith-and-credit statute. Pet. Br. 11. See 28 U.S.C. § 1738. As discussed below, it comports with federalism for state courts to decide those claims in the first instance, subject to direct review by this Court. But, if Congress disagrees, it is free to give property owners a second bite at the apple. See *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986) (holding that the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, does not bind federal courts). Congress *could* decide that some benefit of having federal courts check the work of their state counterparts overcomes the detriment to bedrock principles of res judicata and state sovereignty. But Congress has yet to make such a finding, and this Court rightly has refused to intercede. See *San Remo*, 545 U.S. at 338 ("Federal courts * * * are not free to disregard 28 U.S.C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court.").

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[7] The supplemental-jurisdiction statute is a prime example where Congress has carefully balanced state interests with the practical reasons for allowing federal courts to entertain non-federal claims in particular cases. To avoid piecemeal litigation, Congress has given the federal courts jurisdiction over state-law claims that are "so related to claims within [their] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). At the same time, however, the statute gives the federal court discretion to "decline to exercise supplemental jurisdiction" over certain claims, including those that "raise[] a novel or complex issue of State law." *Id.* § 1367(c).

B. Claims alleging takings by local governments are best suited for resolution by state courts.

This Court should adhere to *Williamson County* for the further reason that it honors "the notion of 'comity,' that is, a proper respect for state functions, * * * and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). A rule that channels most inverse-condemnation actions to state court also is justified by "the special nature" of those actions, which are "intimately involved with [a State's] sovereign prerogative." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28–29 (1959). That is particularly true where (as here) an alleged "taking" stems from "regulation of land use," which "is perhaps the quintessential state activity." *Mississippi*, 456 U.S. at 767 n.30.

It is "a foundational principle of our federal system" that "[s]tate courts are adequate forums for the vindication of federal rights." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). Consistent with that principle, Pennsylvania and other States have vested their own courts with the responsibility for deciding claims that seek the compensation required by the Fourteenth Amendment. Petitioner proffers no legal or empirical basis to "distrust the capacity of state courts to render correct decisions" on those claims. *Allen*, 449 U.S. at 105. State judges are "bound" to apply federal law when deciding claims under the Just Compensation Clause. U.S. Const. Art. VI, cl. 2. And, there are strong reasons to *trust* state courts to "resolv[e] the complex factual, technical, and legal questions" that arise in such cases. *San Remo*, 545 U.S. at 347.

This case is illustrative. Faced with the threshold question whether petitioner's property was "taken," respondents would argue that neither enactment nor application of the Township's cemetery ordinance effected a taking of her property because "background principles of nuisance and property law" already required her to grant the public reasonable access to the cemetery thereon. *Lucas v. S. Car. Coastal Council*, 505 U.S. 1003, 1031 (1992). See *Beatty*, 27 U.S. at 584 (characterizing interference with a burial right as a "public nuisance"). If petitioner had no right to exclude cemetery visitors to begin with, then the ordinance did not cause even an "injury in fact." *Lucas*, 505 U.S. at 1012 n.3.

If the state court were to disagree with respondents on that point, it would undertake "a complex balancing process," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982), to decide whether the ordinance curtailed petitioner's right to exclude others to a sufficient degree to constitute a "taking."[8] That process would be familiar to the Court of Common Pleas because the federal Just Compensation Clause "is interpreted using the same standards and framework" that govern its counterpart in the state constitution. *Pa. Workers' Comp. Judges Prof'l Ass'n*, 39 A.3d at 496.

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[8] The "traditional doctrine[]" of cemetery visitation, which "already opened [petitioner's] property" to others, differentiates this case from one in which the government acquires "a classic right-of-

For present purposes, the outcome of that process is less germane than its subject: state law. State law is the "foundation[]" of the "property interests" protected by the Fifth and Fourteenth Amendments, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017), and "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). A court addressing petitioner's claim would need to exposit at least the common-law right of cemetery visitation, the Township's cemetery ordinance, and the recent state statute governing cemetery access, the last of which almost certainly places an expiration date on any "taking" by the Township. See *supra*, pages 11–13.

That is all before the reviewing court could find itself appraising petitioner's farmland to ascertain just compensation. To aid in that endeavor, the Court of Common Pleas would have at its disposal "a competent and efficient

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way easement." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 832 n.1 (1987). Nor has petitioner "los[t] all rights to regulate the time in which the public enter[s] onto" her land to visit the cemetery. *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994). Contra Pet. Br. 47. "[T]he clause last in order" in the pertinent section of the ordinance "prevails," 1 Pa. C.S. § 1934, and that clause preserves the common-law right to impose "[]reasonable restrict[ions]" on cemetery visitors. J.A. 22. See also 1 Pa. C.S. § 1922(1) (state law must be interpreted to avoid "unreasonable" results); *Board of Supervisors v. Ford*, 283 A.2d 731, 735 (Pa. Commw. Ct. 1971) (applying state canons of construction to local ordinances). Given that petitioner has not alleged that *anyone* has tried to visit the cemetery on her property in the wake of the ordinance, it is quite possible that any "pecuniary loss" would be "zero." *Brown v. Legal Found.*, 538 U.S. 216, 240 (2003).

piece of machinery" in the form of the County Board of Viewers, whose local "knowledge and experience" in land valuation would be of substantial benefit. *In re Reber*, 84 A. 587, 589–90 (Pa. 1912). The advantages of that time-honored Pennsylvania institution would be lost in a federal forum. See *Feree v. Meily*, 3 Yates 153, 154 (Pa. 1801) (addressing "an act of 1700" under which "the court appointed six persons to view and adjudge the value of * * * lands of the petitioner as had been taken up for [public] use"). For at least those reasons, a state court "is better equipped" than a federal one to adjudicate any claim for just compensation that petitioner could file. Pet. App. A32.

In the final analysis, the Constitution's "fundamental interest in federalism" justifies affording state courts the opportunity to hear inverse-condemnation claims against local governments in the ordinary course. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008). See generally *Printz v. United States*, 521 U.S. 898, 931 n.15 (1997) (noting that, except where the Eleventh Amendment is concerned, "the Constitution's guarantees of federalism" extend to local governments to the same degree as their parent States). That strong federalism interest outweighs any "general, undefined federal interest in uniformity" of takings jurisprudence. *Danforth*, 552 U.S. at 280.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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July 2018

APPENDIX

APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. Amend. XIV, § 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. § 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. 26 Pa. Cons. Stat. Ann. § 102 provides, in relevant part:

Application of title.

(a) General rule.--This title provides a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages.

5. 26 Pa. Cons. Stat. Ann. § 302 provides, in relevant part:

Declaration of taking

(a) Condemnation and passage of title.--

(1) Condemnation under the power of condemnation given by law to a condemnor shall be effected only by the filing in court of a declaration of taking with the security required under section 303(a) (relating to security required).

(2) The title which the condemnor acquires in the property condemned shall pass to the condemnor on the date of the filing, and the condemnor shall

be entitled to possession under section 307 (relating to possession, right of entry and payment of compensation).

(b) Contents.--The declaration of taking shall be in writing and executed by the condemnor and shall be captioned as a proceeding in rem and contain the following:

(1) The name and address of the condemnor.

(2) A specific reference to the statute and section under which the condemnation is authorized.

(3) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the declaration of taking was authorized, including the date when the action was taken and the place where the record may be examined.

(4) A brief description of the purpose of the condemnation.

(5) A description of the property condemned, sufficient for identification, specifying the municipal corporation and the county or counties where the property taken is located, a reference to the place of recording in the office of the recorder of deeds of plans showing the property condemned or a statement that plans showing the property condemned are on the same day being lodged for record or filed in the office of the recorder of deeds in the county in accordance with section 304 (relating to recording notice of condemnation).

(6) A statement of the nature of the title acquired, if any.

(7) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.

(8) A statement of how just compensation has been made or secured.

6. 26 Pa. Cons. Stat. § 502 provides:

Petition for appointment of viewers

(a) Contents of petition.—A condemnor, condemnee or displaced person may file a petition requesting the appointment of viewers, setting forth:

(1) A caption designating the condemnee or displaced person as the plaintiff and the condemnor as the defendant.

(2) The date of the filing of the declaration of taking and whether any preliminary objections have been filed and remain undisposed of.

(3) In the case of a petition of a condemnee or displaced person, the name of the condemnor.

(4) The names and addresses of all condemnees, displaced persons and mortgagees known to the petitioner to have an interest in the property acquired and the nature of their interest.

(5) A brief description of the property acquired.

(6) A request for the appointment of viewers to ascertain just compensation.

(b) Property included in condemnor's petition.—The condemnor may include in its petition any or all of the property included in the declaration of taking.

(c) Condemnation where no declaration of taking has been filed.—

(1) An owner of a property interest who asserts that the owner's property interest has been condemned without the filing of a declaration of taking may file a petition for the appointment of viewers

substantially in the form provided for in subsection (a) setting forth the factual basis of the petition.

(2) The court shall determine whether a condemnation has occurred, and, if the court determines that a condemnation has occurred, the court shall determine the condemnation date and the extent and nature of any property interest condemned.

(3) The court shall enter an order specifying any property interest which has been condemned and the date of the condemnation.

(4) A copy of the order and any modification shall be filed by the condemnor in the office of the recorder of deeds of the county in which the property is located and shall be indexed in the deed indices showing the condemnee as grantor and the condemnor as grantee.

(d) Separate proceedings.—The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order separate viewers' proceedings or trial when more than one property has been included in the petition.

7. 9 Pa. Cons. Stat. § 702 provides:

Declaration of policy

The General Assembly finds and declares as follows:

(1) An individual has a right to reasonable access for visitation to a burial plot in a cemetery that is owned by a cemetery company or person other than a cemetery company or is a private cemetery or private family cemetery.

(2) The Commonwealth has a significant interest in protecting that right.

8. 9 Pa. Cons. Stat. § 703 provides:

Reasonable access for visitation

(a) Cemetery companies.—A cemetery company shall grant an individual reasonable ingress and egress to a burial plot in a cemetery owned by a cemetery company for the purpose of visiting the burial plot.

(b) Cemeteries not owned by cemetery companies.—The owner of a cemetery not owned by a cemetery company shall grant an individual reasonable ingress and egress to a burial plot in the cemetery for the purpose of visiting the burial plot.

(c) Private cemeteries and private family cemeteries.—The owner of property where a private cemetery or private family cemetery is located shall grant an individual reasonable ingress and egress to a burial plot in the private cemetery or the private family cemetery for the purpose of visiting the burial plot.

(d) Residential buildings.—For cemeteries, private cemeteries or private family cemeteries where a residential building is located on the real property, the owner of the real property may determine that reasonable access includes prearranged times for visitation and the methods of ingress and egress to the burial plot.

(e) Access standards.—The cemetery company or the owner of real property where a cemetery, private cemetery, private family cemetery or burial plot is located may designate the frequency, hours and duration of visitation and the route of ingress and egress.

(f) Immunity.—The cemetery company or the owner of real property where a cemetery, private cemetery, private family cemetery or burial plot is located shall, in the absence of gross negligence or willful misconduct, be immune from liability in a civil suit, claim or cause of action arising out of access granted under this section.

(g) Petition.—An individual denied reasonable access under this section may petition the court of common pleas having jurisdiction where the cemetery, private cemetery, private family cemetery or burial plot is located for relief.

No. 17-647

In The

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT; CARL S. FERRARO,
Individually and in his Official Capacity as Scott
Township Code Enforcement Officer,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF REPLY ARGUMENT

This Court granted certiorari in this case to reconsider the principle, articulated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-94 (1985), that a property owner cannot file an "inverse condemnation" takings claim[1] in federal court until she unsuccessfully seeks compensation through state court procedures. This doctrine rests on the assumption that a takings claim is not "complete" until there is a "violation" of the Just Compensation Clause and that this will not occur until "the State fails to provide adequate compensation for the taking." *Id.* at 195. Petitioner Rose Mary Knick (Ms. Knick) and her amici have shown that this state litigation or state compensation ripeness rule is logically flawed, unworkable, and unnecessary for ripeness in Fifth Amendment inverse condemnation takings cases. Petitioner's Brief at 15-43.

As Ms. Knick's opening brief explains, the state compensation rule is incorrect because it fails to account for the fact that an inverse condemnation action does not assert that a taking violates the Constitution due to the absence of compensation. It seeks to prove that a government act not recognized as a taking is in fact a taking that entitles the claimant to a monetary remedy under the Just Compensation Clause. *Id.* at 33-39. *Williamson County* cannot be right in stating that an inverse condemnation claimant must seek compensation to create a ripe claim when lack of compensation is not an aspect of the claim.

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[1] Ms. Knick uses the term "inverse condemnation" in a general sense as (1) a "proceeding initiated by the property owner . . . [that is] available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings," Eugene McQuillin, *The Law of Municipal Corporations, Eminent Domain* § 32:158 (3d ed.), and (2) where the constitutional concept of "just compensation" supplies a compensatory remedy. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315-16 (1987).

In response, the Township of Scott (Township) argues that *Williamson County* (correctly) derived the state compensation requirement from 42 U.S.C. § 1983, rather than from the Just Compensation Clause. But *Williamson County* cannot be repackaged in this way. 473 U.S. at 195 n.14. Moreover, the new argument fails to salvage *Williamson County*. The state compensation requirement is just as incorrect as a Section 1983 barrier as it is as a general, constitutionally premised takings rule.

The Township also fails to allay concerns that *Williamson County*'s state compensation requirement is incoherent and unfair in application. It suggests lower courts have means to mitigate the *Williamson County* preclusion barrier that divests federal courts of power to hear "ripe" takings claims and the removal/ripeness trap that allows defendants to avoid takings litigation by removing a takings claim properly filed in state court to a federal court. Unfortunately, courts have already tried the suggested judicial tools and found them too weak to remedy *Williamson County*'s pernicious impact on takings litigation.

Ultimately, the Township focuses its fire on Ms. Knick's takings claims. It contends, for the first time, that Ms. Knick could not raise inverse condemnation takings claims under Section 1983 at all. The Township is wrong. She properly raised the claims under Section 1983 and the Constitution itself. Its suggestion that a state common law cemetery access principle might hinder federal adjudication is also baseless. No such principle exists, and federal courts could handle it if it did. Notably, the Township does not deny it made a "final decision" applying its Ordinance to Ms. Knick and that her claims are therefore fit for review under traditional ripeness principles. Only *Williamson County*'s mistaken and dysfunctional state compensation doctrine stands between Ms. Knick and a hearing on the merits of her physical takings claims.

The Court should abrogate that doctrine and hold that Ms. Knick may litigate her claims that the Township caused a taking warranting compensation in federal court.

ARGUMENT

I.

THE TOWNSHIP FAILS TO JUSTIFY *WILLIAMSON COUNTY*'S STATE COMPENSATION REQUIREMENT

A. *Williamson County*'s Doctrine Cannot Be Sustained as a Section 1983 Rule

The Township's core argument is that *Williamson County*'s state compensation ripeness doctrine is correct as a rule governing takings claims raised pursuant to 42 U.S.C. § 1983. Respondents' Brief at 7-10. Asserting that Section 1983 is available only to remedy a constitutional "violation," *id.* at 28-29, the Township reads ***Williamson County*** to hold that a Section 1983 takings claim cannot accrue until a state denies compensation, because no Just Compensation Clause "violation" occurs until that time. *Id.* at 29-34. In essence, it contends that Section 1983 will not support an inverse condemnation action that invokes the Just Compensation Clause as a *remedy*, rather than as a violated constitutional provision. Based on this logic, the Township asserts that *Williamson County* is correct in holding that a Section 1983 takings claimant must seek and be denied compensation to allege a complete claim. This novel position is unsupportable.

1. *Williamson County* Is Premised on an Incorrect Reading of the Just Compensation Clause, Not Section 1983

The Township's argument begins from the premise that *Williamson County* derived the state compensation requirement as a construction of Section 1983, rather than from the Just Compensation Clause.[2] But this quickly falls apart with the recognition that the takings claim in *Williamson County* did not arise solely under Section 1983; it was also raised "pursuant to the Fifth Amendment." Br. for Resp't Hamilton Bank of Johnson City, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, No. 84-4, 1984 WL 565756, at *3 (U.S. 1984); Oral Arg. Tr. No. 84-4 at 51 (U.S. Feb. 19, 1985). In beginning its analysis, the *Williamson County* Court confirmed that the claim at issue was "*a claim under the Just Compensation Clause*." 473 U.S. at 186 (emphasis added).

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[2] The Solicitor General also contends *Williamson County* is a Section 1983 rule, albeit one that is incorrect. Brief for the United States at 20-21. This is puzzling, since it took the *opposite* position—that state exhaustion is a *constitutionally* based rule—in the *Williamson County* proceedings, Br. for the United States as Amicus Curiae Supporting Pet'rs, No. 84-4, 1984 WL 565763, at 10 (U.S. Nov. 15, 1984); Oral. Arg. Tr. No. 84-4 at 22:3-4 (U.S. Feb. 19, 1985) ("essential element of a Fifth Amendment claim"), and in *Horne v. Dep't of Agric.*, 569 U.S. 513 (2013). *See* Br. for

Williamson County repeatedly described the state compensation requirement as a general rule for takings claims, not as a Section 1983 concept. For instance, it states: "*the taking claim* is not yet ripe [because] respondent did not seek compensation through the procedures the State has provided," *id.* at 194 (emphasis added), and "if resort to that [state compensation] process 'yield[s] just compensation,' then the property owner '*has no claim against the Government*' *for a taking*." *Id.* at 194-95 (emphasis added; citation omitted). When rejecting the plaintiff's specific claim, the *Williamson County* Court did not point to a Section 1983 problem; it held that "its *taking claim* is premature" until the plaintiff used

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Resp't, *Horne v. Dep't of Agric.*, No. 12-123, 2013 WL 543625, at **21-22, *40 (U.S. Feb. 12, 2013). The United States' new and mistaken focus on Section 1983 likely derives from a desire to avoid any impact on the Tucker Act/Claims Court procedure that governs takings claims against the United States. It need not be concerned. Ms. Knick does not challenge that process and it is not at issue.

Tennessee procedures. *Id.* at 196-97 (emphasis added).

The Court articulated the state compensation requirement as a general takings rule because it rooted the requirement in the Fifth Amendment. 473 U.S. at 194-95. *Williamson County* declares that the state compensation requirement derives from "*the special nature of the Just Compensation Clause.*" *Id.* at 195 n.14 (emphasis added); *see also San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 349 (2005) (Rehnquist, C.J., concurring) ("*Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement."); *Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 512 (2d Cir. 2014) (*Williamson County*'s "exhaustion requirements are [ ] derived from elements that must be shown in any takings claim: [1] a 'taking' [ii] 'without just compensation.'").

If there was any doubt that *Williamson County* crafted the state compensation requirement as a takings rule rooted in a reading of the Just Compensation Clause, this Court's post-*Williamson County* decisions dispel it. *Horne v. Dep't of Agric.*, 569 U.S. 513, 525-26 (2013) (reading *Williamson County* to hold that "a Fifth Amendment claim is premature" until the claimant is "denied just compensation"); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997) ("The second hurdle [in *Williamson County*] stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment . . . ."); *San Remo*, 545 U.S. at 327 (observing that *Williamson County* "held that *takings claims* are not ripe until a State fails 'to provide adequate compensation for the taking'" (emphasis added)); *id.* at 349 (Rehnquist, C.J., concurring) (*Williamson County* "interpret[s] the Fifth Amendment."). No decision from this Court grounds the state compensation requirement in a construction of Section 1983. Similarly, the Township fails to cite a single lower federal court decision that views *Williamson County*'s doctrine as a construction of Section 1983.

The Township and the Solicitor General suggest that *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999), reframed *Williamson County*'s state compensation requirement as a Section 1983 rule. Not so. *Del Monte Dunes* assumed the correctness of *Williamson County* as a general takings doctrine in discussing its application to a Section 1983 claim. 526 U.S. at 710. The decision did not renounce *Williamson County*'s reliance on constitutional interpretation or its general reach; it accepted both. *Id.* (citing *Williamson County* for the proposition that "[h]ad the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered *no constitutional injury*" (emphasis added)).

The ending of the *Del Monte Dunes* opinion does note that "[a] federal court . . . cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy." *Id.* at 721. The Solicitor General contends this sentence "explicitly formulated the *Williamson County* rule" as a Section 1983 doctrine. Brief for the United States at 21. This is meritless. The origin of *Williamson County*'s doctrine was not at issue in *Del Monte Dunes*, that decision never says it is meant to modify *Williamson County*, and cases subsequent to *Del Monte Dunes* show that no such thing occurred. *San Remo*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (*Williamson County* "interpret[s] the Fifth Amendment."). The *Del Monte Dunes* statement is simply a recitation of *Williamson County*'s erroneous state requirement in the Section 1983 context, 526 U.S. at 710, not a "reformulation" of *Williamson County* as a Section 1983 doctrine or a holding that the statute independently requires state procedures.

Since *Williamson County* articulated the state compensation ripeness doctrine as an outgrowth of the Just Compensation Clause, and this Court has treated it that way ever since, *Suitum*, 520 U.S. at 734; *San Remo*, 545 U.S. at 349 (Rehnquist, C.J., concurring), the proper interpretation of the Clause is highly relevant to the issue of whether *Williamson County* is correct. This Court's repeated statements that the "without just compensation" language in the Just Compensation Clause serves as a damages remedy in inverse condemnation takings cases—a principle the Township does not dispute—ends the debate. *First English*, 482 U.S. at 315-16, 321; *Jacobs v. United States*, 290 U.S. 13, 16 (1933); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting) (The issue of "tabulating the 'just compensation' to which the property owner is entitled" comes into play after a court finds that "a taking has occurred."). It cannot be the case that one must establish a failure to receive compensation to create a "complete" inverse condemnation takings claim, as *Williamson County* concludes, when the claim is about whether a taking occurred at all, and the "Just Compensation Clause" supplies a remedy after liability is established. *Kirby Forest Industries v. United States*, 467 U.S. 1, 5 (1984) ("[T]he owner has a right to bring an 'inverse condemnation' suit . . . *on the date of the intrusion* by the Government." (emphasis added)); *United States v. Dow*, 357 U.S. 17, 22 (1958) (it is the invasion of property that "gives rise to the claim for compensation."); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) ("the landowner has already suffered a constitutional violation" when subject to "occupancy, physical invasion, or regulation" that causes a taking).

2. *Williamson County's* State Compensation Requirement Is Wrong as a Section 1983 Rule

Even if one could plausibly read *Williamson County's* doctrine as a Section 1983 rule, it is still incorrect. As the Township sees it, a property owner cannot raise a Section 1983 takings claim until denied compensation at the state level because a constitutional "violation" subject to Section 1983 does not arise until then. In this way, it claims property owners are categorically barred from using Section 1983 to raise an inverse condemnation claim that invokes the Just Compensation Clause only as a damages remedy. Respondents' Brief at 31. This argument was never raised or considered below, nor did the Township present it in its opposition to the petition for certiorari. The Court could accordingly deem it waived. Sup. Ct. R. 15.2. In that event, this case would simply proceed on the assumption that Section 1983 is an available vehicle for raising a takings claim that seeks to prove the government has carried out a taking warranting a compensatory remedy under the Just Compensation Clause.

In any case, as the Solicitor General recognizes, the Township's argument that Section 1983 is unavailable for inverse condemnation claims is wrong on the merits. Brief for the United States at 29-31. Section 1983 forbids local governments from subjecting any person to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. This Court has held that this language is to be broadly construed to protect the widest array of federal rights. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (noting Act's "broad and sweeping . . . protection"). Section 1983 "must be given a liberal construction," *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399-400 (1979), and it is settled that property rights "are basic civil rights" within the broad reach of the statute. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). Consequently, the Court has reviewed takings claims arising under Section 1983 on many occasions, without any concern that this is improper. *See, e.g., Suitum*, 520 U.S. at 728 ("Suitum has brought an action for compensation under . . . 42 U.S.C. § 1983, claiming that the agency's determinations amounted to a regulatory taking of her property."); *Lake Country Estates*, 440 U.S. at 399-400; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).[3]

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[3] *See Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 709 (3d Cir. 1985).

Nevertheless, the Township hinges its hopes on the text of Section 1983. Respondents' Brief at 29-31. Highlighting the statute's application to a "deprivation" of a "right . . . secured by the Constitution," *id.* at 33, the Township asserts that the only Takings Clause "right" is freedom from a taking that violates the Just Compensation Clause's "without just compensation" language. From there, it argues that Section 1983 requires a takings claimant to allege a failure to receive compensation, an assertion it believes can only be made after the claimant unsuccessfully utilizes state court procedures.

This is mistaken at several levels. Most importantly, it continues to misunderstand the concept of inverse condemnation and its place in federal law. The right protected by an inverse condemnation action is the right to have interference with property that amounts to a de-facto taking *treated as a condemnation action requiring compensation, or rescinded*. *First English*, 482 U.S. at 321. This right emanates directly from the Just Compensation Clause, and is therefore protected by Section 1983. *Id.*; *Suitum*, 520 U.S. at 728; *Lake Country Estates*, 440 U.S. at 399-400; *see also Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir. 1983). *Williamson County*'s conclusion that a takings claimant must show a constitutional "violation" rooted in the government's failure to compensate (and proven through state litigation) is accordingly wrong even in the Section 1983 context. *Id.*[4]

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[4] Even if the Township is correct that Section 1983 takings claims require a prior denial of compensation, the Court would

Moreover, the Township's defense of *Williamson County's* state compensation rule on Section 1983 grounds fails even if the statute does require a "violation" of the Just Compensation Clause. This is because there is no reason that such a violation should depend on the actions of a *state court*. Those courts are not obligated to pay when a local or state agency takes property. The agency taking property has the duty. *Cf. United States v. Dickinson*, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose."). Whether an action challenged as a taking "violates" the Just Compensation Clause because it is uncompensated, should depend on the actions of the responsible "entity." *San Diego Gas & Elec. Co.*, 450 U.S. at 636 (Brennan, J., dissenting). If a local entity harms property, and has no intent or means to treat it as a compensable taking, the action is uncompensated. The subsequent action of a state court is beside the point because the constitutional violation which the

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still need to overrule *Williamson County's* state compensation requirement for inverse condemnation claims raised directly *under the Fifth Amendment*. *First English*, 482 U.S. at 315 ("[A] landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation . . . .'" *Id.* (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); *Jacobs*, 290 U.S. at 16 ("[s]tatutory recognition [is] not necessary" for an inverse condemnation claim). Such direct actions are plainly available. *id.*, and trigger federal court jurisdiction under 42 U.S.C. § 1331. *See Mosher v. City of Phoenix*, 287 U.S. 29, 31-32 (1932); *Amen v. City of Dearborn*, 718 F.2d 789, 792-94 (6th Cir. 1983).

Township contends is required for a Section 1983 takings claim is already apparent.[5]

Whether read as a general takings rule or a Section 1983 rule,[6] *Williamson County* erred in concluding that a takings claim does not ripen until a property owner seeks and is denied compensation in state court, because this wrongly assumes that the owner must assert a failure to receive compensation to create a "complete" claim. In the inverse condemnation context, the elements of a takings claim are simply: (1) a protected property interest and (2) an injury to property occurring without condemnation proceedings. *Kirby*, 467 U.S. at 5; *see also* McQuillin, *The Law of Municipal Corporations, Eminent Domain* § 32:158. If these elements exist, the claim is fit for review. *See, e.g.*, *Mosher*, 287 U.S. at 31-32 (a takings claim raised a "substantial federal question" where a city confiscated property for use as a road and "there had been . . . no proceedings for condemnation").

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[5] This reasoning supplies an alternate basis (to Ms. Knick's inverse condemnation arguments) for finding that *Williamson County* was wrongly decided as a general matter.

[6] Notably, under the Township's position, Section 1983 takings claims would be improper even in *state* courts without prior state procedures—unless the Court created some kind of ad-hoc state court exception. *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (state courts have jurisdiction over Section 1983 claims). Indeed, in general, the Township seeks to keep the *Williamson County* doctrine intact as a patchwork of ad-hoc and accidental rules that lack any consistent doctrinal thread and which create unpredictable and unjust outcomes in practice.

3. Ms. Knick's Claims Expose *Williamson County*'s Flaws

This case aptly illustrates the error of requiring state compensation procedures in an inverse condemnation takings case. Ms. Knick alleges that the Town caused a taking by authorizing public and governmental access to her property. The Township does not deny that the underlying injury—the enactment and application of the cemetery access ordinance—occurred. It denies that it caused a taking. Respondents' Brief at 48. The controversy is accordingly about whether liability for a taking exists. Ms. Knick says it does. The Township says it doesn't. If Ms. Knick is right, and a taking is found, the Just Compensation Clause will come into play at the time of such a finding, providing her with a federal damages remedy. *First English*, 482 U.S. at 315-16; 321.

Williamson County's state compensation requirement would require Ms. Knick to ask a Pennsylvania court for compensation before she can assert that the Township is liable for a taking. It demands that she ask for her remedy (compensation) before she alleges and proves liability (a taking). This is backward. Again, the issue on which her case, and all similar inverse condemnation cases, hinges is whether a taking warranting damages under the Just Compensation Clause occurred in the first place. When a dispute is otherwise ripe, as here, the issue of takings liability is perfectly suited for resolution by a federal court. *See, e.g., Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust,* 508 U.S. 602, 614-15, 643-46 (1993) (federal courts adjudicate regulatory takings liability); *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 250 (1987) (federal courts adjudicate physical takings liability).

That Pennsylvania provides a process for proving a taking (and a compensatory remedy) that is similar to the federal process associated with the Just Compensation Clause has no bearing on Ms. Knick's right to resolve the dispute on federal grounds in federal court. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court."); *McNeese v. Board of Educ. for Cmty. United Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 672 (1963) (rejecting the idea that "assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court"). State constitutional protections mirror federal ones in many areas, yet it has always been the case that a plaintiff may choose to pursue only the federal remedy. *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on [§ 1983] . . . we have not required exhaustion of state judicial or administrative remedies . . . ."). *Williamson County* was wrong in deviating from this principle, and the Township has identified no other reason for preventing property owners from electing to establish a taking and resulting entitlement to damages in federal court rather than in a state tribunal. *Felder v. Casey*, 487 U.S. 131, 149 (1988) (rejecting "as utterly inconsistent with the remedial purposes of its broad statute the notion that a State could require civil rights victims to seek compensation from offending state officials before they could assert a federal action").

II.

THE TOWNSHIP HAS FAILED TO JUSTIFY THE JURISDICTIONAL CHAOS ARISING FROM *WILLIAMSON COUNTY*

The Township fails to rebut the evidence that *Williamson County* is "draconian," *Murphy v. Village of Plainfield*, 918 F. Supp. 2d 753, 761 (N.D. Ill. 2013), and "paradoxical" in practice, *Chapman v. City of Blanco*, No. A-08-CA-392-SS, 2008 WL 11411224, at *3 (W.D. Tex. July 25, 2008), because it unintentionally prevents federal courts from resolving ripe takings claims and creates a removal trap that prevents litigation in state *and* federal court. *See* Petitioner's Brief at 24-33.

A. The Township Fails To Justify the Preclusion Barrier

The Township does not deny the existence of the *Williamson County/San Remo Hotel* anomaly that sends takings claims to state courts for ripeness purposes but then precludes federal courts from hearing the claims after failed state litigation supposedly ripens them. Petitioner's Brief at 24-27. Yet, it views the banishment of takings litigation from federal courts as an unremarkable event justified by "federalism." Respondents' Brief at 33, 46.

In *San Remo Hotel*, the concurring justices considered and rejected this rationale, finding that no "longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed." *San Remo*, 545 U.S. at 350 (Rehnquist, C.J., concurring in the judgment). Nevertheless, the Township argues federal courts are not suited to deal with takings claims that may implicate state law property issues. Again, the Court has rejected this argument. In *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 725-26 (2010), a plurality of Justices rejected the idea that federal courts "lack the knowledge of state law" needed to decide takings cases. *Id.* The plurality noted that federal courts "often decide what state property rights exist" in due process cases, *id.* at 726, and have the same capability in takings claims. *Id.* at 726-27 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)). As an example of an issue within the federal courts' competence, the *Stop the Beach* plurality cited the "background principles of the State's law and property" inquiry in takings cases—the same standard which the Township fingers in *questioning* federal competence to address takings disputes. 560 U.S. at 725-27.

Still, the Township suggests that state courts have more familiarity with the local issues relevant to takings claims. If so, this is only because *Williamson County* has wrongly shunted takings claims to state courts for the last thirty years, not because of some institutional deficiency in the federal system. *Stop the Beach*, 560 U.S at 742 (Kennedy, J., concurring in the judgment) ("[This Court's dicta in *Williamson County* . . . explains why federal courts have not been able to provide much analysis" on a particular takings issue (citation omitted)). As Chief Justice Rehnquist noted in *San Remo Hotel*, federal courts often deal with local land use issues in First Amendment, Equal Protection and other constitutional cases. 545 U.S. at 350-51 (Rehnquist, C.J., concurring); *see also* Brief Amicus Curiae of Institute for Justice at 16-22. There is no reason they cannot do so in takings cases.

The Township's defense of *Williamson County* on "federalism" and "comity" grounds is ultimately grounded in the local and state governments' desire to keep an important constitutional issue close to home. The Court put this aspiration to rest long ago. *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 313-15 (1913).

B. The Township Fails To Justify the Takings Removal Problem

The Township also fails to justify the bar to takings litigation in federal or state courts that arises from *Williamson County* interaction with removal jurisdiction. It recognizes that government defendants may frustrate state and federal court review of takings claims by removing a claim that is properly filed in state court under *Williamson County* to a federal forum that must treat the claim as unripe under that decision's state compensation requirement. Nevertheless, it argues that there is only "*one*" removal/ripeness case "in which a federal district court wrongly refused a property owners' entreaty" for a hearing. Respondents' Brief at 39. This is absurd.

Ms. Knick's opening brief provided a sample of federal cases holding that a takings claim properly filed in state court is nonjusticiable under *Williamson County* because removal prevented completion of state litigation. Petitioner's Brief at 31-32. There are many more.[7] The removal/ripeness trap swallows takings claims arising directly under constitutional provisions, *see, e.g., BFI Waste Systems of North America v. Dekalb County*, 303 F. Supp. 2d 1335, 1347-49 (N.D. Ga. 2004), as well as those based on Section 1983. This is defensible only if one believes it is just and jurisdictionally sound to direct takings claimants to take a step to secure prompt judicial review—go to state court—that will likely destroy their claim instead, or at least, create unnecessary confusion, delay and waste.

Not to worry, the Township says, federal courts have tools to avoid the removal/ripeness trap. Respondents' Brief at 38. It points to a power to exercise supplemental jurisdiction over state law takings claims, to find defendants "estopped" from invoking *Williamson County* after removal or to find the scheme inconsistent with due process. *Id.* Yet, courts have had these tools for decades, and have generally not used them to soften *Williamson County*, believing that the decision reflects a strict policy of requiring takings claims to begin and end in state court—even when this triggers a wasteful and unjust jurisdictional merry-go-round. *See Murphy*, 918 F. Supp. 2d at 761 (stating that the court "must adhere to *Williamson County*" and declining to waive it in a takings removal case); *Chapman*, 2008 WL 11411224, at *3 (stating that the "Court remains bound by" *Williamson County* and required to find a removed takings claim unripe because state procedures were incomplete).

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[7] *See, e.g., Murphy*, 918 F. Supp. 2d at 760-61; *Save More Food Markets, Inc. v. Wisconsin Dep't of Transp.*, No. 16-cv-447-jdp, 2016 WL 4131866, at *2 (W.D. Wis. Aug. 3, 2016); *Chapman v. City of Blanco*, No. A-08-CA-392-SS, 2008 WL 11411224 (W.D. Tex. July 25, 2008).

III.

THE TOWNSHIP HAS FAILED TO SHOW THAT MS. KNICK'S CLAIMS ARE IMPROPER IN FEDERAL COURT

Finally, the Township argues that Ms. Knick's claims are not justiciable because it believes they arise solely through a Section 1983 vehicle that (in its view) is not available for inverse condemnation claims. It further suggests her claims raise state common law property issues that are ill-suited to a federal forum. It is mistaken again.

A. Ms. Knick Properly Raised Her Claims Under Section 1983 and the Constitution

The allegations in Ms. Knick's complaint are enough to refute the Township's attempt to tie her inverse condemnation takings claims to Section 1983 alone—though they would still be proper in that guise.[8] In the jurisdictional section of the complaint, Ms. Knick alleges that her "action arises under the Constitution *and* Laws of the United States, including 42 U.S.C. Section 1983," and thus, that jurisdiction exists under "28 U.S.C. Section 1331 *and* 1343." JA at 93, ¶ 2 (emphasis added). In her request for relief, Ms. Knick ask for "compensatory damages" in general. More generally, the complaint consistently points to the Constitution as the source of Ms. Knick's request for compensation for a taking of her property. If the Court were to agree with the Township's new argument that Ms. Knick cannot assert an inverse condemnation taking under Section 1983, it should recognize that she sufficiently raised her claims under the Fifth Amendment and 28 U.S.C. § 1331. *Bell v. Hood*, 327 U.S. 678, 679-84 (1946); *Dickinson*, 331 U.S. at 748 ("The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action'—when they are born, whether they proliferate, and when they die.").

The Township raises no other ripeness or jurisdictional barriers to Ms. Knick's takings claims. It does not deny that her as-applied and facial takings allegations satisfy the "final decision" and injury-based ripeness inquiry that pre-dates *Williamson County*. Petitioner's Brief at 41-48. It only denies liability for a taking, confirming that it has no plan to compensate her and that a concrete controversy exists.

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[8] The Solicitor General suggests Section 1983 is the exclusive vehicle for raising a constitutional takings claim. It is not. It simply provides an alternative to raising the cause of action directly under the Constitution. *See Carlson v. Green*, 446 U.S. 14, 18-19 (1980).

B. There Is No Pennsylvania Common Law Access Principle at Issue Here

The Township does suggest that this case is more appropriate for state court because it believes Ms. Knick's takings claims depend on resolution of an alleged Pennsylvania common law principle allowing access to private cemeteries. Respondents' Brief at 48. As noted above, the Court has already rejected this type of argument as a basis for a general limit on federal court review of takings claims. *Stop the Beach*, 560 U.S. at 725.

But the Township's argument also fails because the alleged Pennsylvania common law issue is simply not in play. Pennsylvania courts have never held—or even hinted—that the general public has a right to access private land containing a private cemetery. The Township cites *St. Peter's Evangelical Lutheran Church v. Kleinfelter*, 8 Pa. D & C. 612 (Pa. Ct. Com. Pl. 1926), and *McDonald v. Monongahela Cemetery Co.*, 75 A. 38 (Pa. 1909), but neither is on point. The first case involved a dispute about destruction of a public burial ground. The second involved a financial dispute about burial plots in a public cemetery. Neither comes close to recognizing a public easement over private land.

It is true that some state courts have implied a private cemetery access easement in favor of *relatives* of the deceased.[9] But Pennsylvania case law does not even recognize this principle, much less one granting an access easement to the general public.

The Township observes that the Pennsylvania legislature adopted a cemetery statute in 2017. *See* Respondents' Brief, Appendix 5a-7a. It suggests that the new statute "codified" state common law. There is no evidence that this is true. *See id.* In any case, the 2017 statute is significantly different from the Township's Ordinance. Although the new statute declares an "individual has a right to reasonable access for visitation to a burial plot," it explicitly allows the owner of subject land to "designate the frequency, hours and duration of visitation" and "the route of ingress and egress" to the plot. *Id.* at 5a-6a. Further, for land on which there is a house, like Ms. Knick's, the statute allows a landowner to require "prearranged times for visitation" and to decide the "methods of ingress and egress" to a burial plot. *Id.* at 6a. In contrast, the Township's Ordinance contains no limits on the frequency, hours, and duration of public access to Ms. Knick's residential property, and affords her no right to control "the route of ingress and egress." JA at 20-24.

A statute that is far narrower than the Ordinance, and which was enacted forty-seven years after Ms. Knick acquired her land, and five years after passage of the Ordinance, hardly qualifies as a complex state law defense to a takings claim. *Lucas*, 505 U.S. at 1029-31 (a common law property rule can be a potential takings defense only if it "inhere[s] in the title" to property); *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) (rejecting the proposition that "any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment").

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[9] The amicus brief of the "Cemetery Law Scholars" claims some states protect "public" access to private grave sites. Brief Amicus Curiae of Cemetery Law Scholars at 15. It cites three cases for this principle. *Id.* at 5 n.10. None are from Pennsylvania, and none recognize unfettered public access to private cemeteries even in the states from which they arise.

Nothing inhibits review of Ms. Knick's takings claims except *Williamson County*'s state compensation requirement. Since that requirement was never correct in this context and is unworkable, it should be overruled, leaving Ms. Knick free to prove in federal court that the Township caused a taking and owes her compensation.

CONCLUSION

The Court should vacate the decision below and remand for further proceedings.

DATED: August, 2018.

Respectfully submitted,

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No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK, PETITIONER

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

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QUESTION PRESENTED

Whether *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), properly bars a property owner from filing an action in federal district court seeking just compensation for an asserted taking by a local government in circumstances where state law provides an adequate mechanism for obtaining just compensation in state court.

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In the Supreme Court of the United States

No. 17-647

ROSE MARY KNICK, PETITIONER

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

INTEREST OF THE UNITED STATES

This case concerns the procedures available to property owners seeking to recover just compensation for Fifth Amendment takings by local governments. Those procedures do not apply to suits seeking to recover for asserted takings by the United States, which may be brought only under the Tucker Act, 28 U.S.C. 1491, or another statute waiving sovereign immunity. But the United States has a substantial interest in the sound development of the relevant Fifth Amendment principles.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this brief. App, *infra*, 1a-4a.

STATEMENT

A. The *Williamson County* Rule

1. The plaintiff in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985) (*Williamson County*), owned land in Tennessee that it wanted to develop into a residential subdivision. *Id.* at 175. After the local planning commission refused to approve the development, the plaintiff sued in federal court, alleging that the applicable zoning laws amounted to a Fifth Amendment taking. *Id.* at 176-182. It invoked 42 U.S.C. 1983, which provides a cause of action to a party subjected to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by a person acting under color of state law. *Williamson County*, 473 U.S. at 182.

This Court concluded that the Section 1983 action was "not yet ripe" because the plaintiff had not pursued state procedures for obtaining just compensation. *Williamson County*, 473 U.S. at 194.[1] The Court explained that the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, the taking." *Ibid.* Instead, "all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Ibid.* (quoting *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)).

Applying that principle in *Williamson County*, the Court observed that Tennessee law appeared to allow the plaintiff to "bring an inverse condemnation action to obtain just compensation for [the] alleged taking." 473 U.S. at 196. The Court noted that the plaintiff "ha[d] not shown that the inverse condemnation procedure [wa]s unavailable or inadequate." *Id.* at 196-197. And the Court held that "until [the plaintiff] ha[d] utilized that procedure, its taking claim [wa]s premature." *Id.* at 197.

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[1] The Court separately held that the claim was premature because the plaintiff had "not yet obtained a final decision regarding how it w[ould] be allowed to develop its property." *Williamson County*, 473 U.S. at 190. That holding is not at issue here. Pet. App. A20-A21.

In a footnote, the Court explained its holding in terms that reflected its understanding that the cause of action in Section 1983 is available only to redress constitutional *violations*: "[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a [Section] 1983 action." *Williamson County*, 473 U.S. at 194 n.13 (emphasis omitted).

2. In describing the claim at issue as "premature" and "not yet ripe," *Williamson County* appeared to assume that an owner required to pursue a state compensation mechanism would be able to seek relief in federal court if the state-court procedure was adequate but the owner was dissatisfied with the result. That assumption has proved incorrect. Under 28 U.S.C. 1738, state-court judgments in inverse-condemnation actions have claim- and issue-preclusive effect. *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 545 U.S. 323, 336 (2005) (*San Remo*). Accordingly, a property owner who unsuccessfully seeks compensation in state court is generally barred from bringing a subsequent action in federal court. *Id.* at 346-348. Because of that result, critics of the *Williamson County* rule, including several Members of this Court, have stated that it "all but guarantees that claimants will be unable to utilize the federal

courts to enforce the Fifth Amendment's just compensation guarantee" against local governments. *Id.* at 351 (Rehnquist, C.J., concurring in judgment); see *Arrigoni Enters.* v. *Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (*Arrigoni*) (Thomas, J., dissenting from denial of certiorari); *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J., concurring in part and concurring in judgment).[2]

B. The Present Controversy

In 2012, respondent the Township of Scott enacted an ordinance regulating cemeteries, which the ordinance defines to include any area that has been used as a burial place. Pet. App. A2. The ordinance provides that an owner whose property contains a cemetery must allow public access to the cemetery during daylight hours. *Ibid.* It also provides that respondent's agents may enter any property in the Township to enforce the ordinance. *Id.* at A4.

Petitioner owns land in the Township. Pet. App. B2. Respondent has determined that her property contains a cemetery, and petitioner no longer contests that determination. *Id.* at A4; see Pet. Br. 6 n.2. In 2013, respondent issued two notices advising petitioner that she was violating the ordinance's public-access requirement. Pet. App. A4-A5.

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[2] The effect of the *Williamson County* rule is limited to claims against local governments. "[T]he State and arms of the State * * * have traditionally enjoyed Eleventh Amendment immunity," and Section 1983 does not abrogate that immunity because States as such "are not subject to suit under [Section] 1983" at all. *Howlett* v. *Rose*, 496 U.S. 356, 365 (1990). Suits for injunctive relief against state officers may, however, be brought under Section 1983. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

In 2014, petitioner filed this Section 1983 suit in federal district court. Pet. App. B4. As relevant here, she alleged that the ordinance results in a taking because it creates easements allowing access to her property. *Id.* at B4-B6. The court dismissed petitioner's Fifth Amendment claim without prejudice, relying on *Williamson County*. *Id.* at B1-B18.

The court of appeals affirmed. Pet. App. A1-A33. It held that, under *Williamson County*, a property owner bringing a federal suit to recover for an asserted taking by a local government must first "seek and be denied just compensation using the state's procedures, provided those procedures are adequate." *Id.* at A20-A21. The court explained that Pennsylvania law allows a property owner to bring an inverse-condemnation action to obtain compensation for a Fifth Amendment taking. *Id.* at A5. The court noted that petitioner had neither availed herself of that procedure nor shown that it is inadequate. *Id.* at A21. The court therefore affirmed the dismissal of her Fifth Amendment claim "pending exhaustion of state-law compensation remedies." *Id.* at A32.

SUMMARY OF ARGUMENT

Owners whose property is taken by a local government have a Fifth Amendment right to receive just compensation. Like other plaintiffs asserting constitutional claims against local governments, those owners should be able to vindicate their federal rights by bringing actions in federal court. This Court should clarify or overrule *Williamson County* to make clear that they may do so.

I. *Williamson County* began by recognizing that the Fifth Amendment does not require compensation to be paid in advance of, or contemporaneously with, a taking. That recognition broke no new ground—to the contrary, this Court had already held for nearly a century that the government may take property without paying compensation in advance if it has provided the owner with a reasonable, certain, and adequate mechanism for obtaining just compensation. Congress and the Executive Branch have relied on that principle, and petitioner does not challenge it here.

II. That settled Fifth Amendment principle does not, however, bar an owner whose property is taken by a local government from seeking just compensation in a federal forum. The owner's ability to do so depends not on the meaning of the Takings Clause, but instead on a statutory question: whether she has a cause of action to enforce her Fifth Amendment rights that is within the jurisdiction of the federal courts.

Williamson County answered that question by assuming without explanation that an owner whose property is taken by a local government lacks a cause of action under 42 U.S.C. 1983 unless the government violated the Fifth Amendment. Lower courts have extended *Williamson County* more broadly, treating it as a ripeness rule that bars federal courts from entertaining *any* cause of action seeking compensation for a taking by a local government until after the owner has sought compensation in state court.

That rule creates an unfortunate Catch-22: Until an owner is denied compensation in state court, she cannot bring a federal action because her claim is not "ripe." But as soon as a state court denies compensation, her federal claim is barred because the state judgment precludes further litigation. *Williamson County* thus effectively closes the federal courts to local takings claimants. That is a serious and unjustified anomaly, and this Court should eliminate it by making clear that those claimants may vindicate their Fifth Amendment rights in federal court. The Court could accomplish that result in either of two ways.

First, the Court could clarify that *Williamson County* leaves takings claimants with a viable path to federal court. It applies only to Section 1983 suits and poses no obstacle if an owner invokes a different cause of action. And if the *Williamson County* rule bars a Section 1983 action, it is *because* the owner has such a cause of action available—usually, an inverse-condemnation action like the one available to petitioner under Pennsylvania law. That cause of action is, of course, a creature of state law. But "even though state law creates a party's cause of action," her claim may still be within the jurisdiction of the federal district courts under 28 U.S.C. 1331 where, as here, "a well-pleaded complaint establishe[s] that [her] right to relief under state law requires resolution of a substantial question of federal law." *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 164 (1997) (*International College*) (brackets and citation omitted).

Second, this Court could reconsider and reject *Williamson County*'s assumption about Section 1983. As several Members of the Court have recognized, the anomalies and confusion spawned by *Williamson County* provide ample justification for reconsideration. So does the fact that *Williamson County* relied on an unexplained assumption about the cause of action available under Section 1983 rather than a full statutory analysis. And a fresh examination of Section 1983's text, history, and practical operation—in combination with the unique nature of the Takings Clause—indicate that *Williamson County* was mistaken. Because the Fifth Amendment gives an owner whose property is taken a right to just compensation, she is properly regarded as having been "depriv[ed] of a[] right[] * * * secured by the Constitution" within the meaning of Section 1983 if she has not yet received that compensation. That remains true even where the presence of an adequate state compensation mechanism means that the local government has not violated the Fifth Amendment.

ARGUMENT

I. THE FAILURE TO PROVIDE CONTEMPORANEOUS COMPENSATION FOR A TAKING DOES NOT VIOLATE THE FIFTH AMENDMENT IF THE GOVERNMENT HAS PROVIDED AN ADEQUATE MECHANISM FOR OBTAINING JUST COMPENSATION

Williamson County recognized that the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, [a] taking." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985). Instead, "all that is required" for a lawful taking of property for public use "is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Ibid.* (citation omitted). Petitioner does not challenge that fundamental Fifth Amendment principle, which is reflected in nearly 130 years of this Court's precedents.

A. This Court Has Long Held That The Fifth Amendment Does Not Require That Compensation Be Paid Before Or At The Same Time As A Taking

The Takings Clause, made applicable to the States and their political subdivisions by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V; see *Penn Cent. Transp. Co.* v. *City of*

New York, 438 U.S. 104, 122 (1978). "As its text makes plain," the Clause "'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation omitted). "In other words, it 'is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'" *Id.* at 536-537 (citation omitted). The Fifth Amendment's text is silent on *when* the required compensation must be paid. This Court, however, has long held that the government may provide the owner with an adequate mechanism for obtaining compensation after a taking.

1. This Court first considered the issue in *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U.S. 641 (1890). That case involved a federal statute authorizing a railroad to condemn land belonging to the Cherokee Nation. *Id.* at 642-648. The Nation argued that the statute violated the Fifth Amendment because it did not "provide for compensation to be made to [the Nation] before the [railroad] entered upon [its] lands." *Id.* at 658. The Court disagreed, emphasizing that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken." *Id.* at 659. Instead, the Court held that "the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Ibid.*

In the decades after *Cherokee Nation*, this Court repeatedly reaffirmed that the Takings Clause does not require "that compensation should be made previous to the taking" so long as "adequate means [are] provided for a reasonably just and prompt ascertainment and payment of the compensation." *Crozier* v. *Fried. Krupp A.G.*, 224 U.S. 290, 306 (1912); see, *e.g.*, *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 22 (1940); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932); *Dohany* v. *Rogers*, 281 U.S. 362, 365 (1930); *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 677 (1923); *Albert Hanson Lumber Co.* v. *United States*, 261 U.S. 581, 587 (1923); *Hays* v. *Port of Seattle*, 251 U.S. 233, 238 (1920); *Bragg* v. *Weaver*, 251 U.S. 57, 62 (1919); *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U.S. 239, 251-252 (1905); *Williams* v. *Parker*, 188 U.S. 491, 502 (1903); *Backus* v. *Fort St. Union Depot Co.*, 169 U.S. 557, 568 (1898); *Sweet* v. *Rechel*, 159 U.S. 380, 400-402 (1895). More than a century ago, the Court described that rule as "[i]ndisputabl[e]," *Crozier*, 224 U.S. at 306, and "settled by repeated decisions," *Williams*, 188 U.S. at 502.

2. This Court's decisions also defined what qualifies as a "reasonable, certain and adequate" provision for compensation. In *Cherokee Nation*, the Court upheld a procedure barring the railroad from entering the land to be condemned until it had deposited with a court double the land's value as determined by independent referees. 135 U.S. at 659. Such security may be necessary when the eminent domain power is delegated to private corporations, which may prove "insolven[t]" or otherwise unable to pay compensation ultimately awarded by a court. Philip Nichols, *The Power of Eminent Domain* § 265, at 309 (1909) (Nichols). But similar measures are not required when the "the public faith and credit are pledged to a reasonably prompt ascertainment and payment" and "there is adequate provision for enforcing the pledge." *Joslin Mfg.*, 262 U.S. at 677; see Nichols § 264, at 307-308. The Court thus repeatedly approved

statutes providing compensation by authorizing owners to bring suits against governmental entities. For example:

- The Court upheld two Massachusetts statutes that provided compensation for the taking of land "by giving the owners a right of action" against the city of Boston. *Williams*, 188 U.S. at 502; see *Sweet*, 159 U.S. at 406-407 (applying the Massachusetts Constitution).
- The Court upheld, as making "full and adequate provision for the exercise of the power of eminent domain," a statute specifying that the owner of a patent taken by the government could "recover reasonable compensation * * * by suit in the Court of Claims." *Crozier*, 224 U.S. at 302-303, 307.
- The Court held that even if a Washington statute constituted a taking, "there was adequate provision for compensation" in generally applicable statutes that "entitle[d] any person having a claim against the State to begin an action thereon" in state court. *Hays*, 251 U.S. at 238.
- The Court similarly held that even if the actions of a federal contractor effected a taking, those actions were "within the constitutional power" because a suit under the Tucker Act "afford[ed] a plain and adequate remedy" by which the owner could seek just compensation. *Yearsley*, 309 U.S. at 20-21.

3. In the decades since *Yearsley*, this Court has repeatedly confirmed that a suit under the Tucker Act provides a constitutionally sufficient mechanism for obtaining just compensation for takings by the federal

government. The Tucker Act waives sovereign immunity and grants the Court of Federal Claims jurisdiction over claims seeking compensation for asserted takings by the United States. 28 U.S.C. 1491(a); see 28 U.S.C. 1346(a)(2) (concurrent district-court jurisdiction over claims seeking $10,000 or less). That generally applicable mechanism ensures that federal actions are not rendered invalid or subject to injunctions merely because they may effect a taking.

Thus, for example, the Court rejected a Fifth Amendment challenge to the Regional Rail Reorganization Act of 1973 because the Tucker Act would supply a "reasonable, certain and adequate provision for obtaining compensation" if the statute effected a taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974) (citation omitted); see *id.* at 125-136. The Court has applied the same logic to many other federal statutes. See, *e.g.*, *Preseault* v. *ICC*, 494 U.S. 1, 11-17 (1990) (National Trails System Act Amendments of 1983); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985) (Clean Water Act); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1019 (1984) (Federal Insecticide, Fungicide, and Rondenticide Act); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 & n.40 (1981) (Surface Mining Control and Reclamation Act); *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 94 n.39 (1978) (Price-Anderson Act); see also *Dames & Moore* v. *Regan*, 453 U.S. 654, 688-689 (1981) (Executive Order). Each of those decisions rested on the premise, reaffirmed in *Williamson County*, that "the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949).

B. This Court's Longstanding Interpretation Is Consistent With The Text Of The Takings Clause And With Historical Evidence

This Court's longstanding interpretation of the Takings Clause is consistent with the Clause's text, with available evidence of contemporaneous understanding, and with early decisions interpreting parallel state constitutional provisions.

1. As this Court recognized in *Cherokee Nation*, the text of the Fifth Amendment "does not provide or require that compensation shall be actually paid in advance." 135 U.S. at 659. Nor could such a requirement be implied from the use of the term "just compensation." To the contrary, "compensation" naturally includes a payment made after the event being compensated.[3] A property owner who receives a post-taking award—which must include an adjustment for the delay in payment, see *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933)—thus receives the "just compensation" the Fifth Amendment requires for a lawful taking.

That understanding is reinforced by the marked contrast between the Fifth Amendment and later state provisions expressly specifying that property could not be taken—or, in some cases, could not be taken by non-state entities—"without just compensation being *previously made*." Ky. Const. Art. 12, § 12 (1792) (emphasis added); see, *e.g.*, Ind. Const. Art. 1, § 21 (1851) ("first assessed and tendered"); La. Const. Tit. VI, Art. 109 (1845) ("previously made"); Md. Const. Art. III, § 46 (1851) ("first paid or tendered"); see also *Blanchard* v. *City of Kansas*, 16 F. 444, 444-445 (C.C.W.D. Mo. 1883) (describing these state provisions).

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[3] See 1 Samuel Johnson, *A Dictionary of the English Language* (2d ed. 1755) ("Recompen[s]e; [s]omething equivalent; amends."); 1 Noah Webster, *An American Dictionary of the English Language* 344 (1841) ("That which supplies the place of something else, or makes good a deficiency.").

2. This Court's interpretation is consistent with the limited available evidence about the contemporaneous understanding of the Takings Clause. In construing the Clause, this Court has looked to St. George Tucker, "the author of the first treatise on the Constitution." *Horne* v. *Department of Agric.*, 135 S. Ct. 2419, 2426 (2015). In his view, the Clause was "probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, *without any compensation whatever*." 1 St. George Tucker, *Blackstone's Commentaries* App. 305-306 (1803) (emphasis added). A requirement to provide an adequate means of obtaining post-taking compensation is consistent with that goal.

Similarly, James Madison—the author of the Takings Clause—referred to the type of protection provided by the Clause as ensuring that private property shall not "be taken directly, even for public use, without *indemnification* to the owner." James Madison, *Property*, Nat'l Gazette, Mar. 27, 1792, *reprinted in* 4 *Letters and Other Writings of James Madison* 479 (R. Worthington ed. 1884) (emphasis altered). "Indemnification" naturally connotes a post-taking payment.

3. Finally, early interpretations of similar language in state constitutions indicate that the Takings Clause

does not require pre-taking compensation. Beginning in the early 1800s, state courts generally held that provisions requiring compensation for takings, without more, did not require "compensation before the actual appropriation." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 560 (1868); see *id.* at 560 n.2 (collecting cases); see also, *e.g.*, Henry E. Mills, *A Treatise on the Law of Eminent Domain* § 124, at 156-157 (1879).[4]

In 1815, for example, the Massachusetts Supreme Judicial Court upheld a statute authorizing the taking of property for a canal and providing for "proceedings to recover damages." *Stevens* v. *Proprietors of the Middlesex Canal*, 12 Mass. 466, 468 (1815). And in 1838, the Indiana Supreme Court upheld a similar statute authorizing the taking of land for a road "without previous compensation." *Rubottom* v. *M'Clure*, 4 Blackf. 505, 508 (1838). The court observed that "the laws of several other states * * * abound with instances of similar legislation," and that "the constitutionality of these laws has never been questioned." *Ibid.*

C. Congress And The Executive Branch Have Relied On This Court's Longstanding Interpretation

Congress and the Executive Branch have relied on this Court's repeated holdings "that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional."

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[4] Another treatise disagreed with that view and cited "some" decisions reaching the opposite result. 2 John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 678, at 1162 (3d ed. 1909). But the cited decisions were issued after 1845, and even then the treatise acknowledged that "in most States it is held that the making of compensation need not precede" the taking. *Id.* at 1162-1163.

Riverside Bayview Homes, 474 U.S. at 128. Because a suit under the Tucker Act is an adequate mechanism for obtaining compensation, Congress can be assured that "the possibility that the application of a regulatory program may in some instances result in [a] taking" will not invalidate the program or result in an injunction. *Ibid.* And for the same reason, Executive Branch officials may faithfully implement Congress's directives without fear that they will later be held to have violated the Fifth Amendment.

That assurance is vital because of "the nearly infinite variety of ways in which government actions or regulations can affect property interests." ***Arkansas Game & Fish Comm'n*** v. ***United States***, 568 U.S. 23, 31 (2012). The Court has recognized that, under its modern takings doctrine, "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Ibid.* For the same reason, it would be impossible to provide compensation in advance for all federal actions that might ultimately be found to be takings. The United States therefore has a substantial interest in the reaffirmation of the nearly 130 years of precedent holding that the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, [a] taking." *Williamson County*, 473 U.S. at 194.[5]

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[5] As a matter of policy, Congress has directed that the federal government should take real property through "formal condemnation proceedings" where possible. 42 U.S.C. 4651(8); see 42 U.S.C. 4602(a). But outside the context of direct appropriations and certain physical invasions, the extent to which a given action will result in a taking is often unclear or contested.

II. THE EXISTENCE OF AN ADEQUATE STATE-LAW MECHANISM FOR OBTAINING JUST COMPENSATION FOR A TAKING BY A LOCAL GOVERNMENT DOES NOT PREVENT THE OWNER FROM VINDICATING HER FIFTH AMENDMENT RIGHTS IN FEDERAL COURT

Although *Williamson County* correctly recognized that a taking by a local government does not *violate* the Fifth Amendment if state law provides an adequate mechanism for obtaining just compensation, that constitutional principle does not bar a property owner from *enforcing* her Fifth Amendment rights by bringing an action in a federal forum. The owner's ability to do so turns not on the Takings Clause, but on a statutory question: whether she has a cause of action to obtain just compensation that is within the jurisdiction of the federal district courts.

Williamson County answered that question by assuming that an owner whose property is taken by a local government lacks a cause of action under Section 1983 unless the government violated the Fifth Amendment. But the Court did not clearly identify or analyze that statutory issue. And because the Court articulated its holding in ripeness terms, lower courts have generally treated *Williamson County* not as an interpretation of Section 1983, but instead as a ripeness rule that bars federal courts from entertaining *any* action seeking compensation for a local-government taking unless the owner first seeks compensation in state court.

That understanding has created a well-recognized Catch-22. Until a property owner is denied compensation by a state court, she cannot bring a federal action because her claim is not "ripe." But once a state court denies compensation, the owner *still* cannot bring a federal action because the state judgment precludes further litigation. *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 545 U.S. 323, 344-348 (2005). The very event that ripens the claim simultaneously bars it. And that means that for most local takings claimants, *Williamson County* has closed the federal courthouse doors altogether. *Id.* at 351 (Rehnquist, C.J., concurring in judgment).

That is a serious and unwarranted anomaly. "Plaintiffs alleging violations of other enumerated constitutional rights" by local governments "ordinarily may do so in federal court." *Arrigoni Enters.* v. *Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (Thomas, J., dissenting from denial of certiorari). "[T]here is 'no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation.'" *Ibid.* (quoting *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994)).

This Court should therefore make clear that local takings claimants may vindicate their Fifth Amendment rights in a federal forum. The Court could do so in either of two ways. First, it could clarify that, regardless of *Williamson County*'s understanding of Section 1983, an owner who asserts a right to compensation under the Fifth Amendment may bring a state inverse-condemnation action in federal district court under the grant of federal-question jurisdiction in 28 U.S.C. 1331. Second, the Court could revisit *Williamson County*'s unexplained interpretation of Section 1983 and hold that the statute provides a means of enforcing an owner's Fifth Amendment right to just compensation even in the absence of a constitutional violation.

A. *Williamson County* Does Not Prevent Local Takings Claimants From Seeking Just Compensation In Federal Court Under Their State-Law Causes Of Action

Properly understood, *Williamson County* rests on the scope of the cause of action afforded by Section 1983. It thus does not apply when an owner invokes a different cause of action to vindicate her Fifth Amendment rights. And if *Williamson County* prevents an owner from bringing a Section 1983 suit, it is *because* she has such an alternative cause of action available: an inverse-condemnation action or another "adequate [state-law] procedure for seeking just compensation." 473 U.S. at 195. That cause of action is created by state law. But a state inverse-condemnation action asserting an owner's Fifth Amendment rights "aris[es] under" federal law within the meaning of 28 U.S.C. 1331.

1. Williamson County *rested on an understanding of the cause of action in Section 1983*

This Court's opinion in *Williamson County* stated that the claim at issue there was "premature" and "not yet ripe." 473 U.S. at 194, 197. Understandably, therefore, the *Williamson County* rule is often described as a matter of "ripeness." *E.g.*, *Horne* v. *Department of Agric.*, 569 U.S. 513, 526 (2013) (citation omitted). But traditional ripeness principles do not support the rule. Instead, *Williamson County*'s logic indicates—and the Court has since confirmed—that it rests on an understanding of the cause of action in Section 1983.

a. Ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003) (citation omitted). The *Williamson County* rule should not be understood as a matter of either constitutional or prudential ripeness.

As to the Constitution, this Court has correctly recognized that an Article III "'Case' or 'Controversy' exists once the government has taken private property without paying for it." *Horne*, 569 U.S. at 526 n.6. The *Williamson County* rule thus "does not affect the jurisdiction of the federal court[s]." *Ibid.*

As to prudential concerns, this Court has stated that prudential ripeness turns on "whether the factual record [i]s sufficiently developed" for review and "whether hardship to the parties would result if judicial review is denied." *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2347 (2014). But *Williamson County* did not analyze those traditional considerations, and they do not support the *Williamson County* rule. The mere availability of a state-court remedy does not undermine either the fitness of a constitutional claim for judicial review or the hardship to the plaintiff if review is denied. Cf. *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990) ("A plaintiff * * * may invoke [Section] 1983 regardless of any state-tort remedy that might be available.").

b. Rather than ripeness, *Williamson County* rested on the Court's assumption that a Section 1983 action is not available unless the plaintiff has suffered a constitutional violation. That is why the Court began with the premise that the government has not violated the Takings Clause if it has provided "reasonable, certain and adequate provision for obtaining compensation." *Williamson County*, 473 U.S. at 194 (citations omitted). It is also why the Court stated that a property owner who has access to such an adequate mechanism "cannot claim a violation" of the Takings Clause. *Id.* at 195. And it is why the Court stated that the fact that "*no constitutional violation occurs* until just compensation has been denied" means that an owner must "utilize procedures for obtaining compensation before bringing a [Section] 1983 action." *Id.* at 194 n.13 (emphasis added).

This Court confirmed that understanding in *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). There, the Court recognized that a California landowner alleging a regulatory taking by a city "was entitled to proceed in federal court under [Section] 1983" notwithstanding *Williamson County* because (at the time) "California did not provide a compensatory remedy for temporary regulatory takings." *Id.* at 710. The Court explained that "[h]ad the city paid for the property or had an adequate postdeprivation remedy been available, [the landowner] would have suffered no constitutional injury from the taking alone." *Ibid.* The Court therefore stated that the landowner's "statutory action" under Section 1983 "did not accrue until it was denied just compensation." *Ibid.* And the Court then explicitly formulated the *Williamson County* rule as providing that "[a] federal court * * * cannot entertain a takings claim under [Section] 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy." *Id.* at 721. *City of Monterey* thus confirms that *Williamson County* is not about ripeness, "but rather * * * whether the claim is cognizable under [Section] 1983 at all." *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994).

2. *Owners asserting a Fifth Amendment right to compensation may bring their state inverse-condemnation actions in federal court under Section 1331*

Even if an owner's Section 1983 suit is barred by *Williamson County*, she may vindicate her Fifth Amendment rights by bringing her state inverse-condemnation action in federal district court under Section 1331.

a. "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings * * * have not been instituted." *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (*San Diego*) (Brennan, J., dissenting) (citation omitted); see *United States* v. *Clarke*, 445 U.S. 253, 257 (1980). If the court finds that a taking has occurred, the result is an award of just compensation and a transfer of the relevant property interest to the government, which "becomes henceforth the full owner." *United States* v. *Lynah*, 188 U.S. 445, 471 (1903). Like a formal condemnation proceeding, therefore, a successful inverse-condemnation action results in a lawful exchange in which the government acquires property for public use and the landowner receives just compensation. See *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 5-6 (1984); *United States* v. *Dow*, 357 U.S. 17, 21 (1958).

Like most other States, Pennsylvania has recognized an inverse-condemnation cause of action. Under the Pennsylvania Eminent Domain Code, 26 Pa. Cons. Stat. Ann. §§ 101 *et seq.* (West 2009), a property owner who believes that her property has been taken may file an inverse-condemnation petition. *Id.* § 502(c). A property owner may invoke the inverse-condemnation procedure "to recover compensation if there has been a taking of land [under] the Fifth Amendment of the United States Constitution or Article 1, § 10 of the Pennsylvania Constitution." *Commonwealth* v. *Rogers*, 634 A.2d 245, 254 n.5 (Pa. Super. Ct. 1993).

If a property owner brings an inverse-condemnation action, the court must "determine whether a condemnation has occurred." 26 Pa. Cons. Stat. Ann. § 502(c)(2) (West. 2009). If the court finds a taking and awards compensation, it must "enter an order specifying any property interest which has been condemned and the date of the condemnation." *Id.* § 502(c)(3). The governmental defendant then files the order "in the office of the recorder of deeds for the county in which the property is located." *Id.* § 502(c)(4).

b. Under 28 U.S.C. 1331, the federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." That provision is most often invoked "by plaintiffs pleading a cause of action created by federal law." *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (*Grable*). But this Court has "recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Ibid.* That longstanding construction "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers." *Ibid.*

This Court has indicated that a state cause of action may be brought under Section 1331 if "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 314). A state inverse-condemnation action based on the Fifth Amendment will ordinarily satisfy those requirements.

First, such a claim necessarily raises a federal question because it rests on the assertion that the property owner has been subjected to "a 'taking' of his property under the Fifth Amendment." *San Diego*, 450 U.S. at 638 n.2 (Brennan, J., dissenting).

Second, in the typical inverse-condemnation case, the governmental defendant denies the owner's contentions about the existence or extent of the asserted Fifth Amendment taking. "This is just the sort of 'dispute respecting the effect of federal law' that *Grable* envisioned." *Gunn*, 568 U.S. at 259 (brackets, citations, and ellipses omitted).

Third, disputed questions under the Takings Clause qualify as "substantial in the relevant sense." *Gunn*, 568 U.S. at 260. The Court has previously recognized that similar questions of federal constitutional law, including takings claims, are of sufficient importance to justify the exercise of federal jurisdiction. See, *e.g.*, *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 164 (1997); *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921). And the proposition that takings claims should not be disfavored among constitutional claims with respect to access to federal court, see, *e.g.*, *Arrigoni*, 136 S. Ct. at 1410-1411 (Thomas, J., dissenting from denial of certiorari), furnishes particular reason for regarding such claims as presenting "substantial" federal questions.

Finally, while allowing state inverse-condemnation actions to be brought in federal court might "materially affect * * * the normal currents of litigation," *Grable*, 545 U.S. at 319, it would not *upset* "the appropriate 'balance of federal and state judicial responsibilities,'" *Gunn*, 568 U.S. at 264 (quoting *Grable*, 545 U.S. at 314). Instead, it would *restore* that balance by ensuring that takings claimants, like other plaintiffs with constitutional claims against local governments, can vindicate their federal rights in a federal forum.

c. This Court's decision in *International College* confirms that state inverse-condemnation actions relying on the Fifth Amendment may be brought in federal court under Section 1331. In that case, a property owner filed state-court actions seeking review of decisions by the Chicago Landmarks Commission under the Illinois Administrative Review Law. 522 U.S. at 159-160. Among other things, the owner alleged that Chicago's landmark ordinances "effect[ed] a taking of property without just compensation under the Fifth and Fourteenth Amendments." *Id.* at 160. The Commission removed the case to federal district court. *Id.* at 161.

This Court held that the case was properly removed because it "could have been filed in federal court" under Section 1331. *International College*, 522 U.S. at 163. Invoking the precedents later synthesized in *Grable* and *Gunn*, the Court explained that "even though state law creates a party's cause of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint establishe[s] that its right to relief under state law requires resolution of a substantial question of federal law." *Id.* at 164 (brackets omitted). And the Court concluded that the owner's "federal constitutional claims"—including its takings claims—

"unquestionably fit within this rule." *Ibid.* The same analysis applies to a state inverse-condemnation action in which the owner asserts a right to just compensation under the Fifth Amendment.[6]

d. If this Court holds that state inverse-condemnation actions may be brought under Section 1331, it will make clear that local takings claimants have a viable path to federal court regardless of the content of state law. If the state provides an adequate inverse-condemnation cause of action for raising Fifth Amendment claims, the owner may bring that action in federal court under Section 1331. If state law does *not* provide an adequate mechanism, then ***Williamson County*** does not apply even on its own terms and the owner is "entitled to proceed in federal court under [Section] 1983." *City of Monterey*, 526 U.S. at 710.[7] And if there is a question about the adequacy of the state-law mechanism, a property owner may proceed in the alternative, invoking both the state cause of action and Section 1983 in her federal complaint.

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[6] State inverse-condemnation actions may involve specialized valuation procedures. See 26 Pa. Cons. Stat. Ann. §§ 502-515 (West 2009). But an established body of law governs the translation of such procedures into federal court, because it has long been settled that formal condemnation proceedings may be removed to federal court (for example, when the parties are diverse). See, *e.g.*, *Boom Co.* v. *Patterson*, 98 U.S. 403, 406-407 (1878); see also Fed. R. Civ. P. 71.1(k).

[7] That situation would exist if, for example, state law "did not provide a compensatory remedy" for the type of taking alleged, *City of Monterey*, 526 U.S. at 710, or if the relevant governmental body were "not subject to inverse condemnation proceedings," *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 n.8 (1997). It would also exist if the state cause of action did not entitle the owner to assert a Fifth Amendment claim, because owners are "not required to resort to piecemeal litigation" to recover just compensation. *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 350 n.7 (1986); see, *e.g.*, *Asociación De Subscripción Conjunta Del Seguro De Responsibilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1, 16-17 (1st Cir. 2007).

Clarifying that the *Williamson County* rule rests on an interpretation of Section 1983 would also resolve the confusion in the lower courts about the rule's purported "jurisdictional" status. See *Arrigoni*, 136 S. Ct. at 1411-1412 (Thomas, J., dissenting from denial of certiorari). And it would eliminate the uncertainty about whether the rule applies to actions originally filed in state court and the associated opportunities for "gamesmanship" if such actions are removed to federal court. *Id.* at 1411; see Pet. Br. 30-33. Because *Williamson County* is an interpretation of Section 1983, it applies to all Section 1983 suits asserting just-compensation claims, whether they are brought in federal or state court. But for the same reason, it does *not* apply to other suits.

e. Here, it appears to be undisputed that petitioner has an inverse-condemnation cause of action under Pennsylvania law that would allow her to assert her Fifth Amendment claim. Pet. App. A5, A21. Thus far, the case has been litigated on the assumption that she could not bring that cause of action in federal district court. If this Court rejects that assumption, it should vacate the judgment below and remand to allow petitioner to amend her complaint to invoke her Pennsylvania inverse-condemnation cause of action.[8]

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[8] The fact that the Takings Clause provides a right to compensation does not resolve the question whether it also creates a cause of action to recover that compensation that can be pressed in federal court. Cf. *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001). In *First English Evangelical Lutheran Church of Glendale* v. *County of Los An-*

B. This Court Also Could Revisit And Reject *Williamson County*'s Understanding Of Section 1983

This Court granted review to decide whether to "reconsider" the *Williamson County* rule. Pet. i. The Court ordinarily requires a special justification before revisiting one of its precedents. As several Members of the Court have already recognized, however, the confusion and anomalies spawned by the *Williamson County* rule furnish ample justification for reconsidering it. And *Williamson County*'s unexplained assumption about the scope of Section 1983 was incorrect.

1. There are special justifications for reconsidering Williamson County*'s understanding of Section 1983*

This Court ordinarily requires some "special justification" before reconsidering one of its decisions. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (citation omitted). The Court has also recognized that "*stare decisis* has special force in respect to statutory interpretation." *Id.* at 2411 (citations and internal quotation marks omitted). But even in the statutory context, *stare decisis* is not "an inexorable command." *Hohn* v. *United States*, 524 U.S. 236, 251 (1998) (citation omitted). And here, several factors provide the requisite special justification for reconsidering *Williamson County*'s understanding of Section 1983.

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geles, 482 U.S. 304 (1987), this Court held that California had erroneously denied compensation for a particular type of taking under its inverse-condemnation cause of action. *Id.* at 314-318. Here, in contrast, Pennsylvania has provided a statutory cause of action that allows owners to recover the full measure of compensation required by the Fifth Amendment, and owners who wish to do so may bring that cause of action in federal court under Section 1331.

First, the *Williamson County* rule—at least as understood by the lower courts—has "downgraded the protection afforded by the Takings Clause to second-class status" by effectively excluding an entire class of takings claimants from federal court. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari). That is a "real anomal[y], justifying [the Court's] revisiting the issue." *San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring in judgment). And that is particularly true because *Williamson County* itself did not appear to recognize that it would have that effect. See pp. 2-3, *supra*.

Second, the *Williamson County* rule has spawned "confusion in the lower courts." *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari). Among other things, the courts of appeals have reached different conclusions about whether the rule is jurisdictional and whether it should apply to claims removed from state court. *Id.* at 1411-1412. The fact that a precedent has proved to be "a positive detriment to coherence and consistency in the law" is a "traditional justification for overruling [it]." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989).

Third, "the affirmative case" for *Williamson County*'s understanding of Section 1983 "has yet to be made"—and certainly was not made in *Williamson County* itself. *San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring in judgment). As we have explained, *Williamson County* began with an understanding of the Fifth Amendment that was correct and grounded in nearly a century of precedent. See Part I.A, *supra*. But the Court then simply assumed that a property owner lacks a cause of action under Section 1983 unless the local government has *violated* the Fifth Amendment. See

Part II.A.1, *supra*. The Court did not explain the basis for that assumption, much less attempt to ground it in Section 1983's text or history.[9]

2. **Williamson County's** *understanding of Section 1983 is incorrect*

Because there is ample justification for revisiting the issue, this Court could ensure a federal forum for local takings claimants by considering afresh whether Section 1983 provides a cause of action to an owner who has not yet received just compensation for a taking by a local government, but who has available an adequate state-law mechanism for obtaining compensation. Section 1983's text and history—in combination with the unique nature of the Takings Clause—indicate that it does.

a. Section 1983 provides a cause of action to a party who is "subjected * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under color of state law. Most constitutional rights confer a right to be free from a type of *unlawful* government conduct—for example, unreasonable searches and seizures. In that typical context, an individual is "depriv[ed] of [a] right[]" secured by the Constitution within the meaning of Section 1983 only if a state actor has acted *illegally* by violating the relevant constitutional provision. This Court has thus often stated that Section 1983 actions "sound in tort,"

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[9] Petitioner errs in contending (Br. 48) that *stare decisis* has less force here because the *Williamson County* rule is "constitutional" or "procedural." As explained, the rule is not constitutional—it does not, for example, preclude Congress from allowing just compensation claims to be brought in federal court. Nor does it govern the procedure by which cases are adjudicated. Instead, it rests on an understanding of Section 1983's scope. See Part II.A.1, *supra*.

City of Monterey, 526 U.S. at 709, or provide a remedy for constitutional "violations," *Howlett* v. *Rose*, 496 U.S. 356, 358 (1990). When the government violates the Takings Clause—by, for example, taking property without providing any mechanism for obtaining compensation—Section 1983 functions just as it ordinarily does: as a remedy for wrongful conduct that violated the Constitution. See *City of Monterey*, 526 U.S. at 710.

Unlike most constitutional provisions, however, the Takings Clause does not merely guarantee a right to be free from specified *unlawful* government action. It also confers a right "to secure *compensation*" for *lawful* takings. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987). And although the government is not required to pay the compensation at the time of the taking, the owner's Fifth Amendment right to compensation vests immediately. *Id.* at 317-320. Indeed, the very definition of a constitutionally sufficient post-taking mechanism is that it provides the owner with a "reasonable, certain and adequate provision" for vindicating that Fifth Amendment right. *Cherokee Nation*, 135 U.S. at 659; see Part I.A, *supra*.

Accordingly, an owner whose property is taken but who has not yet received the constitutionally required compensation can be understood to have been "depriv[ed] of [a] right[] * * * secured by the Constitution." 42 U.S.C. 1983. And that remains true even if the taking did not violate the Fifth Amendment because the owner has been provided with an adequate mechanism for obtaining compensation. In the unique context of the Takings Clause, Section 1983 is not limited to redressing or preventing constitutional *violations*—instead, it also affords an owner an alternative means of *enforcing* her constitutional right to just compensation.

b. That understanding is supported by Section 1983's historical context and practical operation. Section 1983 was originally enacted in 1871, during Reconstruction. *Patsy* v. *Board of Regents*, 457 U.S. 496, 502-503 (1982). Congress intended the statute to "assign[] to the federal courts a paramount role in protecting constitutional rights." *Id.* at 503. As this Court has repeatedly recognized, Congress took that step in substantial part because it "believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of state courts." *Id.* at 506. Section 1983 was, in other words, "an attempt to remedy the state courts' failure to secure federal rights." *Mitchum* v. *Foster*, 407 U.S. 225, 241 (1972).

Partly for this reason, Section 1983 does not generally require exhaustion of state remedies as a prerequisite to suit. *Patsy*, 457 U.S. at 507. Instead, Congress understood that it would "provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Id.* at 506. Section 1983 should not be construed to require a different result for owners seeking to enforce their Fifth Amendment right to just compensation. They too are entitled to the federal forum that Congress intended to provide for federal constitutional claims against state actors.

c. If this Court agrees that Section 1983 allows an owner to bring an action against a local government to recover compensation for a taking even when an adequate state-law mechanism is available, it should make clear that its holding does not mean that the individual officials responsible for such a lawful taking are potentially subject to personal liability. The Court has often recognized that Section 1983 requires it to craft "the elements of, and rules associated with, an action seeking damages" for a deprivation of constitutional rights. *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920 (2017). And the Court has also observed that those rules "should be tailored to the interests protected by the particular right in question." *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978).

Where the "deprivation" giving rise to a Section 1983 action is the fact that the property owner has not yet received compensation for a lawful taking by a local government, she is only entitled to recover compensation from the government that owes it. She has no right to recover from individual officials, because they do not owe compensation for property lawfully taken by the government. It would thus be inappropriate to interpret Section 1983 to impose personal financial liability on those officials. Cf. *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 (2017) (explaining that suits against governmental officials in which "[t]he real party in interest is the government" are "only nominally against the official and in fact against the official's office and thus the [government] itself"); *Hartman* v. *Moore*, 547 U.S. 250, 261-265 (2006) (limiting liability against certain officers where injury ultimately resulted from actions of other officers). The officials responsible for a lawful taking therefore should not be regarded as "person[s]" who have "subject[ed], or caused to be subjected," the property owner to the deprivation of her Fifth Amendment rights within the meaning of Section 1983.[10]

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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[10] For similar reasons, a lawful taking would not give rise to a violation of 18 U.S.C. 242, a criminal statute that uses language paralleling Section 1983 to make it a misdemeanor to "willfully" subject a person to a deprivation of constitutional rights.

APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 242 provides:

Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

3. 28 U.S.C. 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

4. 42 U.S.C. 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

5. 26 Pa. Cons. Stat. Ann. § 502 (West 2009) provides:

Petition for appointment of viewers

(a) Contents of petition.—A condemnor, condemnee or displaced person may file a petition requesting the appointment of viewers, setting forth:

(1) A caption designating the condemnee or displaced person as the plaintiff and the condemnor as the defendant.

(2) The date of the filing of the declaration of taking and whether any preliminary objections have been filed and remain undisposed of.

(3) In the case of a petition of a condemnee or displaced person, the name of the condemnor.

(4) The names and addresses of all condemnees, displaced persons and mortgagees known to the petitioner to have an interest in the property acquired and the nature of their interest.

(5) A brief description of the property acquired.

(6) A request for the appointment of viewers to ascertain just compensation.

(b) Property included in condemnor's petition.—The condemnor may include in its petition any or all of the property included in the declaration of taking.

(c) Condemnation where no declaration of taking has been filed.—

(1) An owner of a property interest who asserts that the owner's property interest has been condemned without the filing of a declaration of taking may file a petition for the appointment of viewers

substantially in the form provided for in subsection (a) setting forth the factual basis of the petition.

(2) The court shall determine whether a condemnation has occurred, and, if the court determines that a condemnation has occurred, the court shall determine the condemnation date and the extent and nature of any property interest condemned.

(3) The court shall enter an order specifying any property interest which has been condemned and the date of the condemnation.

(4) A copy of the order and any modification shall be filed by the condemnor in the office of the recorder of deeds of the county in which the property is located and shall be indexed in the deed indices showing the condemnee as grantor and the condemnor as grantee.

(d) **Separate proceedings.**—The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order separate viewers' proceedings or trial when more than one property has been included in the petition.

No. 17-647

IN THE
Supreme Court of the United States

ROSE MARY KNICK
Petitioner,
v.

TOWNSHIP OF SCOTT; CARL S. FERRARO,
Individually and in his Official Capacity as Scott
Township Code Enforcement Officer,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF PETITIONER URGING REVERSAL

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STATEMENT OF INTEREST[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation litigate in the courts and file amicus briefs to address practices that threaten the financial security and well-being of older Americans. Amici in this regard support the Court's reconsideration of the *Williamson County* requirement that property owners exhaust state court remedies to ripen federal takings claims, and recommend that this doctrine be overturned. Courts have applied the doctrine in a formulaic and inconsistent manner, imposing costly state litigation burdens even where the alleged property taking shares none of the ripeness concerns inherent to the administrative zoning disputes in *Williamson County*. As amici will show, a prominent example – of serious concern to older Americans – is the courts' imposition of costly and needless litigation burdens in cases where property owners allege that state tax authorities, following property tax foreclosure sales, have made final decisions to seize and retain sale proceeds far exceeding the owner's tax debt. *See, e.g.*, *Wayside Church v. Van Buren Cnty*, 847 F.3d 812 (6th Cir. 2017). *Williamson County*'s imposition of state litigation burdens in this context poses a threat to the economic security of older Americans of modest means, especially, given their higher vulnerability to property tax foreclosure and lack of resources to fund needless state litigation to "ripen" their claims.

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[1] Pursuant to the Court's Rule 37.6, amici state that this brief was not authored in whole or in part by any party or its counsel, and that no person other than amici, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief. Pursuant to this Court's Rule 37.2(a), letters by both parties consenting to the filing of amicus briefs are on file with the Court.

AARP and AARP Foundation have participated as amici curiae in the federal and state courts to address the problem of abusive property tax foreclosures as well as other practices depriving citizens of equity in their property. *See, e.g.*, Brief for AARP and AARP Foundation as Amici Curiae Supporting Petitioners, *Wayside Church v. Van Buren Cnty.*, 847 F.3d 812 (6th Cir.), *cert. denied*, 138 S. Ct. 380 (2017) (No. 17-88) (supporting appeal to Court of Appeals for the 6th Cir., and supporting petition for certiorari to the Supreme Court); AARP Amicus Brief in Support of Plaintiffs, *Coleman v. District of Columbia*, 306 F.R.D. 68 (D.D.C. 2015) (No. 13-1456), ECF 56; Order Granting Final Approval of Class Action Settlement Agreement, *Coleman* (No. 13-1456), ECF 70 (preliminary order approving class action settlement of claims alleging violation of Fifth Amendment Takings Clause for failure to return surplus tax sale proceeds to former property owners); Brief Amicus Curiae of AARP, *Battisti v. Beaver Cnty. Tax Claim Bureau* (*In re Battisti*), 105 A.3d 76 (Pa. Commw. Ct. 2014) (No. 733 C.D. 2014) (protest of sheriff's sale to collect $6.30 in late fees charged without notice on 2008 taxes, plus costs, in violation of state procedures).

SUMMARY OF ARGUMENT

The Takings Clause preserves governmental power to regulate property, subject only to the dictates of "justice and fairness." *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness [ ] as it does from technical concepts of property law." *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)). Congress created a federal forum for these and other constitutional claims through 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

The Court in *Williamson County* recognized that where state and local governments have established administrative processes to determine the economic impact of zoning regulations and the calculation of proper compensation, it was premature to consider whether an unconstitutional taking without just compensation had occurred until plaintiff had allowed the process to run its course. There, the Court determined that plaintiff, among other things, had failed to avail itself of zoning variance possibilities that might have reduced the negative impact on its property rights and have helped determine what compensation, if any, was owed. ***Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank***, 473 U.S. 172, 194-97 (1985).

The Court did not stop there, enunciating a general prudential requirement that federal courts should decline to exercise jurisdiction over Fifth Amendment takings claims until property owners first and finally exhaust their state court remedies in order to "ripen" those claims. *Id.*, at 194. Plaintiffs, to avoid this requirement, would have to prove there was no "'reasonable, certain and adequate provision for obtaining compensation' at the time of the taking." *Id.* (quoting *Cherokee Nation v. S. K. R. Co.*, 135 U.S. 641, 659 (1890)).

As Petitioner Knick demonstrates, this state litigation requirement, rather than helping ripen claims for federal court review, often serves to bar such review altogether, as plaintiffs face obstacles of procedural gamesmanship, waiver, preclusion, and unnecessary and prohibitive added cost. Pet'r's Br. on the Merits 24-27, 31-32. ***Williamson County*** also has been applied to categories of property takings unrelated to the case's zoning ordinance origins and not featuring the ripeness considerations that animated the opinion in that case. An unintended result is that the state litigation requirement has unnecessarily raised the cost of access to federal court for such claimants and has diminished those courts' role in adjudicating Fifth Amendment claims.

As amici will show, the application of *Williamson County* to state tax foreclosure cases illustrates the extremes to which courts have taken this doctrine. In these cases, courts have imposed this state litigation ripeness requirement to claims that are facially fit for review, state tax authorities already having taken final action to seize and retain property owners' sale proceeds exceeding their debts. *Rafaeli, LLC v. Wayne Cnty.*, No. 14-13958, 2015 U.S. Dist. LEXIS 72199, at *2 (E.D. Mich. June 4, 2015) (declining federal court jurisdiction even where Michigan law compelled tax authorities to both seize and retain surplus foreclosure sale proceeds). Courts also have imposed the requirement despite uncertainty that any additional state judicial or administrative remedial laws apply to this practice. *See, e.g.*, *Wayside Church*, 847 F.3d at 823-24 ("We have neither certainty nor sound process here. Whether Michigan substantive law provides a remedy for the type of taking alleged here is hardly certain.") (Kethledge, J., dissenting). Finally, this is a circumstance where the added cost and delay imposed by the state litigation doctrine often will act as a total bar to federal court access, the affected property owners, by definition, being individuals and organizations unable to pay their property taxes.

ARGUMENT

I. THE *WILLIAMSON COUNTY* STATE LITIGATION RULE HAS IMPOSED COSTLY AND UNNECESSARY OBSTACLES TO FEDERAL COURT REVIEW OF FIFTH AMENDMENT TAKING CLAIMS

Congress enacted 42 U.S.C. § 1983 with the "inten[t] to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972). "The very purpose of [42 U.S.C.] § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights ...." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

Although this was not foreseen, the *Williamson County* state litigation requirement, as applied, has impeded federal courts from fulfilling this critical role. Rather than acting to "ripen" claims to facilitate federal court review, 473 U.S. at 185, the doctrine's state litigation requirement has erected roadblocks of cost and delay not serving the intended purpose.

As Petitioner Knick observes, one striking example is where plaintiffs litigate the issues in state court as required by *Williamson County*, lose, and then find themselves barred from federal court review on the merits as a matter of res judicata or estoppel. *See, e.g.*, *San Remo Hotel, L.P. v. City & Cnty. of San*

Francisco, 545 U.S. 323, 346-47 (2005); Pet'r's Br. on the Merits 24-27, 31-32 (listing examples).

Plaintiffs also may find themselves on a costly and self-defeating merry-go-round of litigation between federal and state court in removal cases. *See, e.g., Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006) (defendant removes case to federal court, which then dismisses the claim because it "lacks jurisdiction"); *Ohad Assocs., LLC v. Twp. of Marlboro*, No. 10-2183 (AET), 2011 U.S. Dist. LEXIS 8414, *3-4 (D.N.J. Jan. 28, 2011) (federal court accepts removal, denies plaintiff's request for remand back to state court, then dismisses for lack of exhaustion of state remedies); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174 (D. Kan. 1999) (defendants remove case to federal court, which dismisses and remands back to state court).

Finally, plaintiffs may simply lose a war of attrition, courts expecting them to exhaust all possible state administrative and judicial avenues before reaching federal court. *See Evans v. Washington Cnty.*, No. CV-99-1356-ST, 1999 U.S. Dist. LEXIS 20036, at *17 (D. Or. Dec. 10, 1999) ("Nevertheless, the Ninth Circuit has repeatedly held that a plaintiff must seek any available state remedy, statutory procedure, or state constitutional claim before asserting a federal takings claim.").

As members of this Court have recognized, "the justifications for [*Williamson County*'s] state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic." *Arrigoni Enters., LLC* *v. Town of Durham*, 136 S. Ct. 1409, 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari) (quoting *San Remo*, 545 U.S. at 352 (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring). Amici submit that *Williamson County*'s application in the realm of Fifth Amendment challenges to tax foreclosure sales richly illustrates the foregoing—a case where the doctrine's justification is facially suspect (the acts of taking and refusal to compensate clearly final and ripe for review), and where the potential cost of litigating theoretical remedies in state court will often be fatal to the claim (older homeowners having lost the surplus equity needed to finance their basic needs).

II. THE PROPERTY TAX FORECLOSURE CASES ILLUSTRATE THE NEEDLESS ADDED BURDENS AND DELAY IMPOSED BY *WILLIAMSON COUNTY*

A. State Laws Permitting Seizure of Property Owners' Surplus Equity and the Example of *Wayside Church*

A "foreclosure by sale" typically involves "the surplus over the debt [being] refunded to the debtor[.]" *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 541 (1994). The practice of "strict foreclosure" in which "the borrower's entire interest in the property was forfeited, regardless of any accumulated equity" was generally abandoned as a remedy in America in the nineteenth century. *Id.* at 541.

Most state taxing authorities that foreclose on homes by sale of property follow this principle.[2] They return the excess proceeds obtained from a tax sale to the former property owner, after deducting taxes, interest, penalties, fees, and costs of collection. Federal law similarly returns the excess proceeds to the former owner. *See, e.g.*, *United States v. Rodgers*, 461 U.S. 677, 690-94 (1983) (forced sale to recover delinquent federal taxes under 26 U.S.C. § 7403 cannot extend beyond the property interest held by the delinquent taxpayer, and government may not ultimately collect, as satisfaction for the indebtedness owed to it, more than the value of the property interests that are actually liable for that debt).

However, there are a number of states that do not adhere to such "basic equitable principles of fairness." *Fuller*, 409 U.S. at 490. For example, the Michigan property tax foreclosure statute requires local governments to seize title to tax delinquent properties, sell the property, and keep all the proceeds—no matter how valuable the property or how small the tax debt. Mich. Comp. Laws § 211.78 (LexisNexis through 2018 Public Act 153); *Rafaeli, LLC v. Wayne Cnty.*, No. 14-13958, 2015 U.S. Dist. LEXIS 72199, at *2 (E.D. Mich. June 4, 2015). A number of other states also appear to require tax authorities to seize and retain all proceeds of tax foreclosure sales.[3] Additional states fail to affirmatively guarantee a property owner's right to surplus equity.[4]

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[2] *See, e.g.*, Ala. Code § 40-10-28 (LexisNexis through 2018 Reg. Sess.); Fla. Stat. § 197.582 (LexisNexis through 2018 Reg. Sess.); Ga. Code Ann. § 48-4-5 (LexisNexis through 2017 Reg. Sess.).

The *Wayside Church* case is a window into how *Williamson County* is applied with excessive formalism to require costly state litigation to "ripen" claims even where (1) the plaintiff's claim challenging this practice clearly is ripe for review (tax authorities already having made final decisions to seize the proceeds and to refuse compensation), *see Horne v. Dep't of Agric.*, 569 U.S. 513, 526 n.6 (2013) ("[W]hether an alternative remedy exists does not affect the jurisdiction of the federal court" to hear an otherwise ripe takings claims); Pet'r's Br. on the Merits 38 n.14; (2) where it is uncertain that inverse condemnation statutes or other potential state avenues for relief will be deemed applicable to such state-authorized actions of the taxing authorities, and (3) where it is highly likely the defendant will win a war of attrition before the plaintiff reaches federal court, the affected property owners already being in dire financial straits.

---

[3] Minn. Stat. § 280.29 (LexisNexis through ch. 102, 2018 Reg. Sess.); Mont. Code Ann. §§ 15-17-319, 322 (LexisNexis through Nov. 2017 Special Sess.); N.D. Cent. Code § 57-28-20 (LexisNexis through 2017 Reg. Sess.).

[4] *See, e.g.*, Colo. Rev. Stat. § § 39-11-136, 145 (LexisNexis through 1st Reg. and 1st Extraordinary Sess.); Idaho Code Ann. § 63-1006 (LexisNexis through 2018 Reg. Sess.); 35 Ill. Comp. Stat. 200/22-40.

Van Buren County in Michigan instituted a tax foreclosure proceeding to collect delinquent property taxes on three separate properties. 847 F.3d at 815. Plaintiff Wayside Church was deemed to owe $16,750 in delinquent property taxes, interest, penalties, and sale expenses. *Id.* Title to its property passed to the County before the sale by virtue of the foreclosure judgment. *Id.* The county treasurer then sold the church's property for $206,000. *Id.* The County netted surplus proceeds of $189,250, which it retained as required by law rather than returning the money to Wayside Church. *Id.*

An individual plaintiff in the same case who owned a separate property owed $25,000 in delinquent property taxes. *Id.* The County sold that property for $68,750, resulting in a surplus of $43,750, which, again, the County retained for public use. *Id.* A third individual plaintiff owned property that the County sold for $47,750 to collect delinquent property taxes in the amount of $5,900. *Id.* The County retained the surplus proceeds worth $41,850. *Id.*

Plaintiffs filed a class action lawsuit in federal district court alleging that the state's retention of the surplus sales proceeds violated the Takings Clause of the Fifth Amendment. Defendants moved to dismiss, alleging, among other things, that plaintiffs' claims were not ripe because they had failed to avail themselves of a "reasonable, certain, and adequate" remedy in state court as required by ***Williamson County***. *Id.* at 818. The district court disagreed, concluding in part that plaintiffs' only recourse was through a proceeding in a special Claims Court, which the district court found would be fruitless because that court lacked jurisdiction if there was an adequate remedy in the federal courts. *Id.* at 818-19.

On appeal, the Sixth Circuit disagreed with the district court, parsing Michigan statutes to conclude that plaintiffs could avoid Claims Court by pursing a monetary claim in state courts of general jurisdiction. However, the applicability of that statute, too, was so unclear that the court had to rest its interpretation in part on constitutional principles of avoidance: "Because the clearer reading of the relevant statutes allows Plaintiffs to bring their cases . . . in state court, and because this Court is required to read statutes to be constitutional if possible, we conclude that Plaintiffs have failed to establish that jurisdiction in federal court is proper because the state provided no 'reasonable, certain and adequate [procedures] at the time of the taking.' *Id.* at 822.

It is difficult to imagine a claim less in need of "ripening" prior to federal court review. Both the state's seizure of property, and its refusal to return it, were final acts committed by the state tax agency authorized by law to commit such acts. As stated by Judge Kethledge in his dissent,

> In this case the defendant Van Buren County took property worth $206,000 to satisfy a $16,750 debt, and then refused to refund any of the difference. In some legal precincts that sort of behavior is called theft. But under the Michigan General Property Tax Act,

> apparently, that behavior is called tax collection.

Id. at 823.

Moreover, as Judge Kethledge observed, the availability of any additional remedies under Michigan state law was theoretical at best:

> We have neither certainty nor sound process here. Whether Michigan substantive law provides a remedy for the type of taking alleged here is hardly certain. True, Michigan law provides a cause of action for so-called "inverse condemnations," in which the government takes a property interest without a formal exercise of eminent domain. [citations omitted.] And in adjudicating those claims the Michigan courts have recognized what they call "de facto" takings, for which "no exact formula" exists. *Id.* But the Michigan courts have not yet determined, as a matter of state law, whether a local government's appropriation of property pursuant to the taxing power generally, or to the General Property Tax Act in particular, is a taking to the extent the government takes property worth more than the amount of taxes owed.
>
> Perhaps the Michigan courts will recognize this kind of inverse-condemnation claim as viable . . . But it overstates matters to say the Michigan courts' recognition of this type of inverse-condemnation claim is "certain."

> Equally problematic is the jurisdictional uncertainty that awaits the plaintiffs in state court. When they file their inverse-condemnation claim there, they must choose between two courts: the state circuit court, which is a trial court of general jurisdiction, or the state court of claims, which (like its federal counterpart) has jurisdiction over monetary claims "against the state or any of its departments[.]" *See* M.C.L. §§ 600.605 (circuit court), 600.6419 (court of claims). But no matter which court the plaintiffs choose, they will face a strong argument that they chose wrongly.

Wayside, 847 F.3d at 823-24.

Thus, plaintiffs faced the very real possibility of discovering—after years of costly litigation not necessary to "ripen" their claims—that no other Michigan laws offered a remedy for this practice. The bottom line, as Judge Kethledge observed, is that such claims are appropriate for review in federal court in the first place:

> At this point one senses we have lost our constitutional bearings. The plaintiffs have asked us to adjudicate a claim arising under the federal Constitution, which is the most important type of claim that we can adjudicate. The claim itself is substantial: that, when a state takes fee simple to property in satisfaction of a tax obligation, the state effects a taking to the extent the property is worth more than the

> taxes and penalties owed . . . Congress has granted us jurisdiction over that claim. We have a strict duty to exercise that jurisdiction.

Id. at 824-25. Thus, federal courts can and should exercise their jurisdiction to adjudicate takings claims where property owners allege a plausible injury that gives them standing to assert that their claims are ripe. ***See, e.g., Monroe v. Pape*,** 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."), *overruled on other grounds by Monell v. Dep't of Social Servs.*, 436 U.S. 658, 663 (1978).

Wayside Church is not the only example of tax foreclosure claims inappropriately becoming subject to the *Williamson County* state litigation requirement. In *Rafaeli*, property was sold for $24,500 pursuant to Michigan law to collect a mere $8.41 in unpaid taxes. *Rafaeli*, 2015 U.S. Dist. LEXIS at *7. The County retained the excess proceeds in the amount of $24,491.59, and the third-party purchaser who obtained the property at auction listed the property for sale at the price of $70,000. *Id.* at *7-8. The trial court dismissed, holding that it lacked subject matter jurisdiction because of *Williamson County*, despite two previous Supreme Court cases holding that the doctrine does not establish a jurisdictional bar. *See Horne*, 569 U.S. at 526 (doctrine merely prudential); *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Protection*, 560 U.S. 702, 729 (2010) (same).

The *Rafaeli* case, having moved to state court in 2015, is continuing its journey through the Michigan state court system. *See, e.g.*, *Rafaeli, LLC v. Oakland Cnty.*, No. 330696, 2017 Mich. App. LEXIS 1704 (Mich. Ct. App. Oct. 24, 2017) (per curiam, unpublished); *Rafaeli, LLC v. Oakland Cnty.*, No. 156849 (Mich. request for leave to appeal filed Dec. 04, 2017). The Michigan Court of Appeals held that, because the court considered the foreclosure notice to have been sufficient under the Due Process Clause, there could not be, as a matter of law, any Fifth Amendment Takings claim. *See* 2017 Mich. App. LEXIS 1704, at *9-10. The Court of Appeals made no mention of the fact—considered quite important by the federal trial court in the initial action—that the state did not simply repossess delinquent taxes, nor delinquent taxes and a late-payment penalty with costs, but *the entire sale value of the property*. In order to have that central issue addressed, the plaintiffs in *Rafaeli* will have to exhaust their state-court remedies, wasting years and expending considerable money, and then return once more to federal court, at least three and a half years after filing their initial complaint on October 14, 2014. *See* Class Action Complaint, *Rafaeli,* 2015 U.S. Dist. LEXIS 72199, ECF 1.

B. The Burden Imposed by *Williamson County* in the Tax Foreclosure Context is Likely to Fall Disproportionately Upon the Most Vulnerable Homeowners

Home ownership is considered the lynchpin of economic well-being for older Americans. *See* Kermit Baker et al., *Housing America's Older Adults: Meeting the Needs of an Aging Population*, J. Ctr. for Hous. Stud. of Harv. Univ. 1 (2014) [hereinafter *Housing America's Older Adults*], http://bit.ly/1umYrKY. "Older Americans often use[ ] their home equity in retirement to finance health care, home maintenance, and other large expenses and as a safety net that could be used to meet unexpected needs." Lori Trawinski, *Nightmare on Main Street: Older Americans and the Mortgage Market Crisis*, AARP Pub. Pol'y Inst. 3 (July 2012), http://bit.ly/XLk7FC. "For most older people, the home is . . . their most valuable asset." *Id.*

It should not surprise us that older and low-income homeowners—who often have insufficient income to pay for their most basic necessities—are at high risk of losing their homes to aggressive tax foreclosure practices. John Rao, *The Other Foreclosure Crisis: Property Tax Lien Sales*, Nat'l Consumer Law Ctr. 5 (Jul. 2012) [hereinafter *The Other Foreclosure Crisis*], http://bit.lyWbHe62. "As the single largest item in most household budgets, housing costs directly affect day-to-day financial security as well as the ability to accrue wealth to draw upon later in life." *Housing America's Older Adults, supra,* at 1. Housing costs—including taxes, insurance, maintenance, repairs, and utilities—typically consume a disproportionately large share of (the usually low- and fixed) income of older households. *See* William C. Apgar & Zhu Xiao Di, ***Housing Wealth and Retirement Savings: Enhancing Financial Security for Older Americans***, J. Ctr. for Hous. Stud. of Harv. Univ. 16 (Sept. 2005), http://bit.ly/1WbHD8B.

Insufficient income to pay rising property taxes and other expenses is not the only systemic risk that make older homeowners more vulnerable to losing their property to tax foreclosures. For example, older people who do not owe a mortgage no longer enjoy the benefit of paying a portion of their taxes into an escrow account and having those payments automatically transmitted to the taxing authority. Managing one's tax payments without the assistance of a mortgage servicer thus adds greater risk for older homeowners who own their homes outright and risk losing their entire investment if they miss a tax payment. Similarly, most homeowners with a subprime or reverse mortgage do not have the benefit of escrow accounts and thus have a disproportionately greater risk of losing their home to a tax foreclosure. *The Other Foreclosure Crisis, supra,* at 5.

Another common feature of property tax regimes—lump sum billing—also increases the risk of loss for older and low-income homeowners, particularly those whose income is fixed and may find it difficult to set aside sufficient amounts to cover a large annual tax bill. Only 59 percent of Americans in 2017 said that they could come up with $400 in cash to survive an income shock, while the rest would need to borrow money, take out payday loans, use credit cards, or take similar measures. Bd. of Governors of the Fed. Reserve, *Report on the Economic Well-Being of U.S. Households in 2017* 21 (2018), https://bit.ly/2LoT78j.

Paying taxes in a timely fashion also may be particularly difficult for older people who may be experiencing increasingly serious health conditions or disability, diminished capacity to manage finances, cognitive decline, or dementia. *See Housing America's Older Adults, supra,* at 12-14. The risk of having such conditions increases exponentially with advancing age. *See* David Marson & Charles Sabatino, *Financial Capacity in an Aging Society*, 36 J. of the Am. Soc. on Aging (Summer 2012), http://bit.ly/1moAJIL. For example, during 2017, "over one-quarter of adults went without some form of medical care due to an inability to pay." Fed. Reserve, *Report on the Economic Well-Being of U.S. Households in 2017* 23 (2018), https://bit.ly/2LoT78j.

For older Americans the equity their homes is often the principal economic asset needed to sustain them for the rest of their lives. If suffering final state action seizing their equity in a property tax foreclosure, they should not have to endure the added expense and delay of state court litigation to "ripen" Fifth Amendment claims already fit for federal court review.

CONCLUSION

For all these reasons, amici respectfully submit that the *Williamson County* doctrine should be overturned.

Respectfully Submitted,

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No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, ET AL.,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE FOR THE AMERICAN FARM BUREAU FEDERATION, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND CATL FUND IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The American Farm Bureau Federation, National Cattlemen's Beef Association, and CATL Fund submit this brief as *amici curiae* in support of petitioner.[1]

The American Farm Bureau Federation (Farm Bureau) is a voluntary national membership organization with nearly six million member families in all 50 states and Puerto Rico. Established in 1919, the Farm Bureau's primary purpose is to advance and promote the interests and betterment of farming and ranching; the farming, ranching, and rural community; and the individual families engaged in farming and ranching. This effort involves protecting, promoting, and representing the business, economic, social, and educational interests of American farmers and ranchers.

The National Cattlemen's Beef Association (NCBA) is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief by blanket consent.

The CATL Fund is an organization that assists landowners and others similarly situated, including cattlemen, in establishing broad-based legal precedent to protect property rights, promote free enterprise, and minimize regulatory abuses.

The exhaustion/ripeness rules invented in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), have for three decades blocked farmers' and ranchers' pursuit of takings claims to recover compensation for government actions that reduce the value of their land or business. *Williamson County's* requirement that a plaintiff exhaust state judicial remedies before an inverse condemnation claim is ripe in federal court adds enormously to the duration and expense of a takings claim—often making litigation too costly to contemplate. And state court litigation generally makes a later federal suit pointless, because state court determinations have preclusive effect in later federal actions. Making an *England* reservation of federal rights to address this preclusion problem is ineffective, as this Court held in *San Remo Hotel, L.P.* v. *City and County of San Francisco*, 545 U.S. 323 (2005).

For takings plaintiffs, this combination of exhaustion, ripeness, and preclusion presents a bleak prospect. It bars the federal courthouse door to most federal takings claims. Farmers and ranchers are left to state court actions to try to protect their constitutional property rights against state and local government officials, with no hope of obtaining federal relief unless lightning strikes in the form of a grant of certiorari from this Court to review the final state court judgment.

These barriers to vindicating individual constitutional rights rest on errors that it is time to correct. *Amici* focus this brief on two issues that support the need for this Court to abandon *Williamson County*.

First, no other claim under our Bill of Rights has to be ripened in this costly, time-consuming, and cumbersome way. Final action by state and local government officials is typically enough to give rise to a federal constitutional claim, without first testing that claim in state court. This Court's decisions identify no plausible basis for applying a different rule to just compensation claims.

Second, this Court should not follow *Williamson County* merely as a matter of *stare decisis*. Its 30 years in effect have made it not venerable, but instead have exposed its lack of a solid foundation and its dire practical consequences. None of the principles that make *stare decisis* generally beneficial apply here to justify perpetuating so faulty a decision.

Williamson County's procedural limitations to protecting property rights in federal court would be unrecognizable to the Framers of the simple and direct mandate of the Takings Clause. *Amici* have a strong interest in having this Court rein in the exhaustion/ripeness doctrine to afford America's farmers and ranchers a fair opportunity to vindicate their federal rights to just compensation in a federal forum.

SUMMARY OF ARGUMENT

This Court should overrule *Williamson County*'s state-litigation requirement. That requirement bars farmers and ranchers from obtaining federal court remedies for state and local government violations of the Takings Clause. No other right secured by the Bill of Rights is treated this way. The barrier that this Court constructed in *Williamson County* violates our constitutional design and the intent of the Reconstruction Congress that adopted the Fourteenth Amendment and enacted Section 1983. *Stare decisis* does not protect this erroneous decision.

I. The Framers regarded protection of private property as a keystone right. They guaranteed that right in the Takings Clause, which they listed alongside other foundational rights like free speech, assistance of counsel, and due process of law. The Court should not make it harder for citizens to invoke their rights under the Takings Clause than other protections in the Bill of Rights.

Williamson County does precisely that. It prohibits land owners from seeking federal-court remedies under the Takings Clause until after they have exhausted all state judicial remedies. When combined with preclusion under the full faith and credit statute, *Williamson County* bars federal courts from reviewing state takings *at all*. It thereby relegates the Takings Clause to second-class status, allowing federal courts to guard against violations of every individual right in the Bill of Rights *except for* the Takings Clause.

There is no justification for treating the Takings Clause as a poor relation of the other protections in the Bill of Rights. The Court's three-paragraph discussion in *Williamson County* is thoroughly unconvincing, as is the Court's later attempt in *San Remo Hotel* to justify the doctrine.

Congress enacted Section 1983, providing for federal adjudication of violations of federal constitutional rights, because state governments and state courts were not adequately protecting those rights. In line with that purpose, the Court should overturn *Williamson County*'s state-litigation requirement and restore landowners' ability to seek federal court remedies against unconstitutional state takings.

When Congress intends to restrict access to federal courts to litigate federal constitutional claims, it says so. For example, it has specified that habeas corpus petitioners must exhaust state remedies before they may turn to federal court. But Congress placed no such restriction on rights under the Takings Clause. And this Court should not invent such restrictions without congressional action.

Williamson County's state-litigation requirement improperly makes the Takings Clause unenforceable in federal court when state or local governments violate the Constitution. The Court should overrule the requirement.

II. *Stare decisis* compels no different result. *Stare decisis* is at its weakest when this Court interprets the Constitution, and *Williamson County* purported to interpret the Takings Clause. This Court later shifted the rationale for the state-litigation requirement, turning it into a prudential rule. But when this Court makes shifting judge-made rules, *stare decisis* is weak. Both rationales thus significantly diminish the strength of *stare decisis* here.

Three decades of experience have proved the state-litigation requirement to be unworkable. The Court's language in *Williamson County* suggested that property owners would be able to litigate their takings claims in federal court once they exhausted their state judicial remedies. But experience has shown that the preclusive effect of the state court litigation ends the federal cases at the start.

The Court's later attempts to recast the state-litigation requirement have spawned more confusion. There are now circuit splits on whether the state-litigation requirement is jurisdictional or prudential, and on whether the requirement is waivable. Some federal courts even have allowed state and local governments to remove takings claims from state court to federal court—which then dismisses the claims for failure to exhaust state remedies. These courts thereby prevent landowners from litigating their takings claims in *any* forum. The result is a charade that prevents the Takings Clause from serving as a bulwark protecting private property rights.

There are no serious reliance interests at stake. No private citizens have altered their behavior based on where they must litigate takings claims. If anything, ***Williamson County*** encourages unconstitutional takings because state and local governments know that there is no effective federal court oversight. That possibility is a reason to *overturn Williamson County*.

Williamson County's state-litigation requirement was not correct when it was decided, and it is not correct today. The Court should overturn the requirement and restore the Takings Clause to its rightful place as a foundational protection in the Bill of Rights.

ARGUMENT

The protection of individual property rights was a core concern of the Framers of the Constitution and the Bill of Rights. The Framers regarded it as "the first object of government." THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). The Fifth Amendment's Just Compensation or Takings Clause—which applies to the States through the Fourteenth Amendment (*Chi., B. & Q. R.R. Co.* v. *City of Chi.*, 166 U.S. 226 (1897))—lies at the very heart of the constitutional design. See Jennifer Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 9 (1990) (private property supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government"); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 270 (1988) ("protection of private property was a nearly unanimous intention among the founding generation").

It is no secret that, despite the central role of property rights in our Constitution, protecting those rights through takings litigation is fraught with difficulties. Difficult-to-satisfy takings tests that apply to different types of government actions—all well worth this Court revisiting—have made the winning takings plaintiff a rare animal. No lawyer navigating this minefield could ever predict success in a takings suit.

But this case is about a procedural barrier that dooms most inverse condemnation claims *from the very start*, before federal courts even have the opportunity to apply the tests in *Loretto, Lucas, Dolan/Nollan*, or *Penn Central/Pennsylvania Coal*. In *Williamson County* this Court held that "because the Constitution * * * is satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action is not 'complete'"—the fact or extent of the taking is not known—"until the State fails to provide adequate compensation for the taking." 473 U.S. at 195. On this analysis, no taking occurs until the state courts deny adequate compensation. As a result, this Court held, no federal claim for just compensation ripens until the plaintiff has exhausted state court remedies and thereby "fixed" the scope of any taking.

San Remo Hotel then magnified the adverse impact of *Williamson County* on takings plaintiffs. It applied the full faith and credit statute to bind federal courts to rulings made in the required state court litigation, which precludes a federal remedy in most cases. *San Remo Hotel*, 545 U.S. at 326-327. "*San Remo Hotel* dooms plaintiffs' efforts to obtain federal review of a federal constitutional claim even after the plaintiffs comply with *Williamson County*'s exhaustion requirement." *Arrigoni Enters., LLC* v. *Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (Thomas and Kennedy, JJ., dissenting from denial of certiorari).

These doctrines generate additional peculiarities. For example, the exhaustion requirement creates particular problems in states, such as Ohio, that provide no cause of action for inverse condemnations. See Brief *Amicus Curiae* for the Ohio Farm Bureau Federation, in which *amici* here concur. And the doctrines invite "gotcha" litigation tactics in which a defendant removes a takings claim from state to federal court under 28 U.S.C. § 1441. See *City of Chi.* v. *Int'l Coll. of Surgeons*, 522 U.S. 156, 161 (1997). The defendant then seeks to have the removed suit dismissed by the federal court for failure to exhaust state court remedies. See *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.) ("This gamesmanship leaves plaintiffs with *no* court in which to pursue their claims").

The consequence of all this is that it is "almost impossible for federal courts to remedy violations of the Just Compensation Clause." Max Kidalov & Richard H. Seamon, *The Missing Piece of the Debate over Federal Property Rights Litigation*, 27 HASTINGS CONST. L.Q. 1, 5 (1999). That relegation of Fifth Amendment rights to second-class status is unjustified. The precedent that caused it, *Williamson County*, does not meet the standards for *stare decisis* and should be overturned.

I. *Williamson County*'s Ripeness Rules Make The Takings Clause The Poor Relation Of Other Provisions Of The Bill Of Rights.

A. The Framers of our Constitution placed property rights on an equal footing with other civil rights guaranteed in the Bill of Rights. See THE FEDERALIST NO. 54, *supra*, at 339 (James Madison) (government is "instituted no less for the protection of the property, than of the persons, of individuals"). Protection of property "was regarded by the framers" as "an essential precondition to the realization of other basic civil rights and liberties." *Shelly* v. *Kraemer*, 334 U.S. 1, 10 (1948). This Court thus has said that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

But *Williamson County* does exactly that. It creates an exception to the usual principles of federal jurisdiction by insisting that a plaintiff cannot immediately bring a federal takings claim in federal court, but must instead litigate the claim all the way through the state court system—at which point rules of preclusion and *res judicata* bar federal court relief. The effect is that "in most instances the final word of the state supreme court in a land use case is the final word, period," given this Court's limited capacity for additional review. David A. Dana & Thomas W. Merrill, PROPERTY: TAKINGS 264 (2002).

That works an extraordinary limitation on access to the federal courts. As two leading scholars have explained, "Section 1983—the primary vehicle by which citizens seek damages for federal constitutional wrongs committed by state or local officials—has no exhaustion requirement." Dana & Merrill, *supra*, at 262 (citing *Patsy* v. *Fla. Bd. of Regents of Fla.*, 457 U.S. 496, 500-516 (1982)). To the contrary, the "general rule" is that

> plaintiffs who believe that they have been deprived of some federal constitutional right by state or local officials acting under color of law may bring an action in federal district court under [Section] 1983 without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available. For example, when an individual claims that his Fourth Amendment rights have been violated by an unwarranted search or seizure, he may bring a Section 1983 action without first bringing a state court tort action for trespass or battery.

Ibid. Why should takings claimants be treated differently, precluding them from ever vindicating their federal constitutional rights in federal court?

B. This Court's three-paragraph discussion in *Williamson County* offers no persuasive explanation for this stark difference in treatment. The Court referred to the "the special nature of the Just Compensation Clause." 473 U.S. at 196 n.14. Supposedly, because the clause allows government to take private property provided it pays just compensation, a "property owner 'has no claim against the Government for a taking'" if the plaintiff's resort to "an adequate process for obtaining compensation * * * 'yield[s] just compensation.'" *Id.* at 194-195. An "adequate post-deprivation remedy" prevents the takings claim from arising. *Id.* at 195.

But the *substantive* adequacy of the state court's decision is never tested in federal court because of preclusion rules. Owners thus never find out whether a takings claim truly arose. The "special nature" of the Takings Clause, under *Williamson County*, is that federal courts can rarely pass on whether the federal takings claim arose.

Justice Stevens' majority opinion in *San Remo Hotel* offered another justification for singling out takings claims for adverse treatment: state courts "have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." 545 U.S. at 347. But federal courts are hardly unfamiliar with state property law. For example, this Court has often addressed the state law curtilage concept in Fourth Amendment decisions such as *United States* v. *Dunn*, 480 U.S. 294, 300 (1987). And federal courts are the source of every important substantive takings standard. If the "familiarity" rationale were sufficient, as Chief Justice Rehnquist pointed out in his concurrence in *San Remo Hotel*, it "would apply to any number of federal claims," including, "for example, challenges to municipal land-use regulations based on the First Amendment." 545 U.S. at 350-351.

C. A more telling question is why takings claims should not fall under Section 1983 like other civil rights claims. Constitutional rights vary widely, yet all fit under the Section 1983 umbrella absent Congressional direction to the contrary—except the Just Compensation Clause.

Congress in Section 1983 provided litigants a federal remedy for deprivations of their federal rights committed under color of state law. 42 U.S.C. § 1983. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). And federal question jurisdiction under Article III and 28 U.S.C. § 1331 entitles a plaintiff alleging a violation of the Takings Clause to choose a federal forum. The Reconstruction Congress drew no distinction in Section 1983 between different civil rights: the statute applies to "the deprivation of *any* rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983 (emphasis added).

Plaintiffs alleging that state or local officials have taken their property without just compensation may be forgiven for doubting that they will get a fair shake in state courts. Those courts are often staffed by elected judges, and the costs of providing compensation would fall on local governments and ultimately on local taxpayers (and voters). See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (the Fifth Amendment ensures that government may not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). In fact, skepticism about state courts' willingness to hold state and local officials to federal constitutional requirements lay behind the enactment of Section 1983. The Reconstruction Congress "displayed no solicitude for state courts." *Briscoe* v. *Lahue*, 460 U.S. 325, 363 (1983). Far from it, the "debates over the 1871 Act are replete with hostile comments directed at state judicial systems." *Id.* at 363-364.

D. To be sure, plaintiffs cannot vindicate every constitutional right immediately in federal court. But exceptions to the general rule that federal courts provide a federal remedy for constitutional violations must be established by "congressional directive" or careful justification. *San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring in judgment).

Congress has "clearly required exhaustion of adequate state remedies" when it intends to require a constitutional plaintiff to go to state court before pursuing a claim in a federal forum. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973). That is the case for habeas corpus claims by state prisoners. 28 U.S.C. § 2254(b) requires a habeas corpus applicant in federal court to "ha[ve] exhausted the remedies available in the courts of the State" or have shown that those remedies are non-existent or "ineffective."

"[L]ongstanding principle[s] of comity" between federal and state jurisdictions, reflected in federal statutes like the Tax Injunction Act, also displace the usual rule. *San Remo Hotel*, 545 U.S. at 339 (majority), 349-350 (concurrence).

Neither exception applies here. Congress has never carved the Just Compensation Clause out of Section 1983 or erected a habeas-corpus-like bar to takings claims. Nor has it embraced strong comity principles towards state determination of takings claims comparable to its insulation of state tax regimes from direct federal challenge in the Tax Injunction Act, 28 U.S.C. § 1341.

E. While the reasons for the *Williamson County* rule are "suspect," its "impact on takings plaintiffs is dramatic." *San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J.). The exhaustion requirement serves as an unfair means test for entry into federal court. Only those with huge financial resources and the stamina to outlast government bureaucracies can hope to satisfy this test of endurance all the way through the state court system. See Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. WESTERN L. REV. 1, 11 (1992) ("The time and money required to comply with myriad ripeness requirements will prevent most middle-class property owners from pursuing their constitutional right to just compensation [and] * * * make substantive review virtually impossible"); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small").

If a rare takings plaintiff survives this gauntlet, he likely will have no federal remedy anyway. Preclusion and *res judicata*, endorsed by this Court in *San Remo Hotel*, make sure of that. Though a federal takings claim may be "nominally permissible" after exhausting state court remedies, it is in practice "pointless." Dana & Merrill, *supra*, at 264. Surveys during the 1990s showed that 80 to 90 percent of takings claims were dismissed from federal court on ripeness or abstention grounds. See John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 203-204 (1999); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994).

F. In short, *Williamson County* "has downgraded the protection afforded by the Takings Clause to second-class status." *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.). "Plaintiffs alleging violations of other enumerated constitutional rights ordinarily may do so in federal court without first availing themselves of state court." *Ibid.* And this relegation to poor relation status is unjustified. Neither "constitutional [n]or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim." *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J.); see also *Arrigoni Enters.*, 136 S. Ct. at 194 (state litigation rule is "ahistorical, atextual, and anomalous").

This Court should end the *Williamson County* anomaly and restore the Fifth Amendment to its proper place among the other provisions of the Bill of Rights.

II. *Stare Decisis* Does Not Justify Continued Adherence To *Williamson County.*

Stare decisis does not require keeping in place this Court's erroneous decision in *Williamson County*. "*[S]tare decisis* is not an inexorable command." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). This Court "overrule[s] prior decisions where the necessity and propriety of doing so has been established." *Hurst* v. *Florida*, 136 S. Ct. 616, 623 (2016). That test is easily satisfied here. Both the necessity and propriety of overruling *Williamson County* are compelling.

A. "The force of *stare decisis* is at its nadir" in this case. *Alleyne* v. *United States*, 570 U.S. 99, 116 n.5 (2013). *Stare decisis* "is at its weakest" when this Court interprets the Constitution, because this Court's "interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions." *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997); see also *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411 (2014) (contrasting the "special force" of *stare decisis* in statutory cases). And *stare decisis* is especially weak in cases "concerning procedural rules that implicate fundamental constitutional protections"—exactly what is at issue here. *Alleyne*, 570 U.S. at 116 n.5.

Those principles greatly diminish the force of *stare decisis* here. "The Court in *Williamson County* purported to interpret the Fifth Amendment in divining th[e] state-litigation requirement." *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J.). The Court incorrectly "reasoned" that the "language" of the Takings Clause "does not 'require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.'" *Arrigoni Enters.*, 136 S. Ct. at 1409 (Thomas and Kennedy, JJ.) (quoting *Williamson County*, 473 U.S. at 194). That *Williamson County* interpreted the Takings Clause—a fundamental constitutional protection—means that *stare decisis* is at its lowest ebb.

This Court later switched the rationale for *Williamson County*—a sure sign that the case was wrongly decided. Instead of treating the state-litigation rule as a substantive requirement of the Takings Clause, this Court turned it into a "prudential requirement." *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J.); see *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.) ("As early as 1992, the Court began to recast the state-litigation rule"). When this Court makes shifting judge-made law in this way, rather than interprets statutory text, the force of *stare decisis* is weak. *E.g.*, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 899 (2007). Indeed, it is "particularly appropriate" to "[r]evisi[t] precedent" when, as here, "the precedent consists of a judge-made rule" intended "to improve the operation of the courts." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009).

Thus, no matter which of the Court's changing justifications best explains *Williamson County*'s rule, *stare decisis* provides an anemic defense for retaining that incorrect decision.

B. "[W]hen this Court has confronted a wrongly decided, unworkable precedent," it has "chosen not to compound the original error, but to overrule the precedent." *Payne* v. *Tennessee*, 501 U.S. 808, 842-843 (1991) (Souter and Kennedy, JJ., concurring). The Court should follow that course here.

This Court did not have the benefit of briefing on the critical issues it decided in *Williamson County*, and as a result the decision was not well or fully reasoned. Except for a single paragraph in the Summary of Argument section of the Solicitor General's *amicus* brief, none of the twelve merits briefs in *Williamson County* argued for the state litigation requirement. See Br. for U.S. as *Amicus Curiae* Supporting Pet'rs at 10 (No. 84-4) (Nov. 15, 1984).

Misled by this inadequate exploration of the issues, the Court in *Williamson County* inadvertently set a trap for property owners by failing to consider preclusion. The Court clearly thought that the claim at issue could eventually ripen and be heard in a federal forum. 473 U.S. at 194 ("the taking claim is not *yet* ripe") (emphasis added); *id.* at 195 ("the property owner cannot claim a violation * * * until it has used the procedure"). But the Court did not consider the full faith and credit statute, 28 U.S.C. § 1738, which precludes litigation in federal court once a property owner complies with *Williamson County*'s state-litigation requirement.

Courts of appeals spotted this trap and tried to dodge it. To avoid the unfair and constitutionally suspect results of the exhaustion rule, these courts declined to apply full faith and credit to state court judgments. *E.g.*, *DLX, Inc.* v. *Kentucky*, 381 F.3d 511, 520-521, 523-524 (6th Cir. 2004) (avoiding the "unanticipated effect of *Williamson County*"); *Santini* v. *Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118, 127-130 (2d Cir. 2003) (avoiding the "ironic and unfair" "Catch-22" of *Williamson County*); *Front Royal & Warren Cty. Indus. Park Corp.* v. *Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).

In *San Remo Hotel*, this Court disapproved these end-runs around the full faith and credit statute. But in doing so, the Court unleashed the full force of *Williamson County's* exhaustion rule. In springing the preclusion trap on federal takings plaintiffs, *San Remo Hotel* made clear to the four concurring Justices that the "real anomalies" created by *Williamson County* justified reconsidering the decision. 545 U.S. at 351 (Rehnquist, C.J.).

The problems *Williamson County* generates have since become even worse. "[C]lever state-government attorneys have rendered a nullity even the chance at review in *state* court." *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.). State-government attorneys have removed federal takings claims filed in state court under 28 U.S.C. § 1441 and then "have moved to dismiss on the ground that 'the plaintiff did not litigate first in the state court.'" *Ibid.* Some federal courts have blessed this practice. *E.g.*, *Koscielski* v. *City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006). At that point, a plaintiff has "*no* court in which to pursue their [takings] claims." *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.).

In addition, the Court's attempts to change the rationale for *Williamson County's* state-litigation rule "have spawned only more confusion in the lower courts." *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas and Kennedy, JJ.). As described above, this Court converted *Williamson County's* state-litigation requirement from a substantive demand of the Takings Clause to "a 'prudential,'" "not 'jurisdictional'" consideration—and prudential requirements generally can be "'waived.'" *Id.* at 1411 (citing *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Protection*, 560 U.S. 702, 729 (2010), and *Horne* v. *Dep't of*

Agric., 569 U.S. 513, 526 (2013)). Yet "several Courts of Appeals" continue to treat *Williamson County*'s rule as jurisdictional. *Id.* at 1412 (citing examples). And the courts that treat it as prudential "are divided over whether the rule may be waived." *Ibid.* (citing examples). This "quagmire" in "the lower courts is yet another reason" to overturn *Williamson County*. *Ibid.*

Experience has confirmed that *Williamson County*'s state-litigation rule inflicts an unworkable and severe deprivation of constitutional protections. It undercuts "[t]he very purpose of § 1983" to establish "the federal courts * * * as guardians of the people's federal rights." *Mitchum*, 407 U.S. at 242. The decision should be set aside.

C. Another reason why *stare decisis* does not protect *Williamson County* is that "[n]o serious reliance interests are at stake." *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010). *Williamson County* imposes a "procedural rul[e]" that "do[es] not govern primary conduct and do[es] not implicate the reliance interests of private parties." *Alleyne*, 570 U.S. at 119 (Sotomayor, J., concurring). It simply slams shut the federal courthouse doors to a landowner seeking to vindicate her constitutional rights when her land has been taken by state or local government unconstitutionally.

It also makes no sense to talk about government reliance on a procedural rule about where to litigate constitutional deprivations. But even if state or local governments have relied on *Williamson County*, it is precisely that type of reliance that this Court must stamp out. State and local governments know that under *Williamson County* and *San Remo Hotel*, they may take private property without effective federal court oversight. Those takings "have no claim on [this Court's] solicitude," and changing state and local practices by restoring teeth to the Takings Clause is "a small price to pay for the uprooting of th[e] weed" of *Williamson County*. *Hubbard* v. *United States*, 514 U.S. 695, 717 (1995) (Scalia, J., joined by Kennedy, J., concurring in part and concurring in judgment).

D. Finally, "criticism" of *Williamson County*'s state-litigation rule "has been substantial and continuing, disapproving of its reasoning in all respects." *Lawrence* v. *Texas*, 539 U.S. 558, 576 (2003). In *San Remo Hotel*, Chief Justice Rehnquist wrote in a four-Justice concurrence that "the affirmative case for the state-litigation requirement has yet to be made" and that the "justifications" for the requirement "are suspect, while its impact on takings plaintiffs is dramatic." 545 U.S. at 351-352. In *Arrigoni Enterprises*, Justices Thomas and Kennedy reaffirmed those conclusions, asked "whether there are any justifications for the ahistorical, atextual, and anomalous state-litigation rule," and called for its reconsideration. 136 S. Ct. at 1412.

Beyond those observations, courts and commentators have noted *Williamson County*'s "*Alice in Wonderland* quality" and described it as creating a "procedural morass," a "labyrinth," a "quagmire," a "Kafkaesque maze," a "fraud or hoax on landowners," a "weapon of mass obstruction," and a "Catch-22." Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 702-703 (2004) (cataloging courts' and commentators' characterizations of *Williamson County*).

It is beyond time for this Court to overrule *Williamson County*'s state-litigation requirement. The Court should restore the Takings Clause to a co-equal provision in the Bill of Rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 2018

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No. 17-647

In The
Supreme Court of the United States

◆

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

◆

BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

◆

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QUESTION PRESENTED

Should this Court continue to recognize two legal principles: a general need of takings plaintiffs to "complete" their takings claims by first seeking compensation under state law, and an exception to that requirement for facial takings claims?

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STATEMENT OF INTEREST OF *AMICUS*

The American Planning Association (APA) is a nonprofit, public-interest research organization founded in 1978 to advance the art and science of land-use, economic, and social planning at the local, regional, state, and national level. APA, based in Chicago, Illinois and Washington, D.C., and its professional institute, the American Institute of Certified Planners, represent more than 38,000 practicing planners, elected officials and citizens in 47 regional chapters, working in the public and private sector to formulate and implement planning, land-use, and zoning regulations, including the regulation of signs. APA has long educated the nation's planning professionals on the planning and legal principles that underlie land-use regulation through publications and training programs, as well as by filing numerous *amicus curiae* briefs on important land-use law questions in state and federal courts across the country.[1]

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[1] Pursuant to Rule 37.6, the APA affirms that no counsel for a party authored this brief in whole or in part, and that no such counsel or party, other than APA or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents have filed blanket consents to the filing of *amicus curiae* briefs.

SUMMARY OF ARGUMENT

This case presents the Court with an awkward situation in which both the decision below, and the petition for writ of certiorari, are at odds with some of this Court's precedents. In response, this Court should follow—not overrule—those precedents. Despite occasional excessive applications of those precedents by lower courts (which this Court should curb), those precedents generally work well and work fairly. This Court should continue to consider *facial* Fifth Amendment takings claims to be "complete" even if the plaintiff has not first tried and failed to obtain compensation under state law. But this Court should continue to subject *as-applied* Fifth Amendment takings claims to the 128-year-old general rule that such claims are not complete until the plaintiff tries, and fails, to obtain just compensation by pursuing adequate state-law procedures.

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LEGAL ARGUMENT

A. This Court's current jurisprudence recognizes a general need to "complete" a takings claim by first seeking just compensation under state law.

Two lines of authority from this Court are important to acknowledge at the outset.

First, the Takings Clause of the United States Constitution does not proscribe "taking" of property, but only "taking without just compensation." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (quotation omitted); *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 658–59 (1890). Thus, where state law provides an adequate avenue for seeking compensation for an alleged taking of property, ordinarily an essential element of a takings claim is not present unless the plaintiff has pursued such avenues and failed to obtain just compensation. This requirement is now known as the "second prong" of the *Williamson County* rule. *See Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

Second, the *Williamson County* second prong does not apply where—as here—a facial takings claim is at issue.[2] In *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), this Court recognized that the second prong does not apply to facial takings challenges. As Justice Stevens' opinion for the Court explained:

> [P]etitioners have overstated the reach of *Williamson County* throughout this litigation. Petitioners were never required to ripen the heart of their complaint – the claim that the [ordinance] was facially invalid because it failed to substantially advance a legitimate state interest – in state court. See *Yee v. Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L.Ed.2d 153 (1992). **Petitioners therefore could have raised most of their facial takings challenges, which by their**

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[2] Petitioner stated in her Petition for Writ of Certiorari that her Second Amended Complaint included both facial and as-applied takings claims. (Pet. 9).

> **nature requested relief distinct from the provision of "just compensation," directly in federal court.**

San Remo, 545 U.S. at 345–46 (emphasis added); *see also id.* at 340 n.23 ("Petitioners' facial challenges to the [ordinance] were ripe, of course, under *Yee*. . . .").

In short, both those who advocate abolition of the *Williamson County* second prong, and those who advocate application of that test to all of Petitioner's takings claims (including her facial takings challenge), need this Court to depart from *stare decisis*. For this reason, the APA will focus its *amicus* brief on whether the heightened standards for overruling the Court's own precedents are satisfied under these circumstances, paying particular attention to the planning-related considerations involved. In so doing, the APA will identify certain divisions of authority in the lower federal courts in the application of these principles, and suggest how this Court might best resolve those conflicts.

B. The extraordinary circumstances needed to overrule existing precedents are not present here.

This Court has articulated the extraordinary circumstances that must be demonstrated before this Court will consider overruling a well-established precedent. As this Court noted in *Harris v. United States*, a "special justification" is required:

> *Stare decisis* is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting), but the doctrine is "of fundamental importance to the rule of law," *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). Even in constitutional cases, in which *stare decisis* concerns are less pronounced, we will not overrule a precedent absent a "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

536 U.S. 545, 556–57 (2002).

Williamson County was not an aberration. The principles embodied in *Williamson County*'s second prong were articulated more than a century ago and have been consistently followed by this Court since then. In explaining why landowners must seek "just compensation" and not simply wait for it to be tendered, the *Williamson County* decision quotes language first articulated in 1890 by the first Justice Harlan in *Cherokee Nation v. Southern Kansas Railway Co.*:

> It is further suggested that the act of congress violates the constitution in that it does not provide for compensation to be made to the plaintiff before the defendant entered upon these lands for the purpose of constructing its road over them. This objection to the act cannot be sustained. **The constitution declares that private property shall not be taken "for public use without just compensation."** It

> **does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken; but the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed.**

135 U.S. at 658–59 (emphasis added). This principle was soon applied to local takings. *See Sweet v. Rechel*, 159 U.S. 380, 400–07 (1895) (Harlan, J.) (finding no taking without just compensation by a city because the commonwealth had enacted a statute providing an avenue for certain and adequate compensation for the taking). This Court continued to articulate these principles in a variety of different kinds of takings cases. *See, e.g.*, *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923) ("It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge."); *Hurley v. Kincaid*, 285 U.S. 95, 103 (1932) (holding that the ability of landowner to seek compensation for taking under the Tucker Act, after taking has occurred, makes injunction against taking unavailable); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949) ("Where the action against which specific relief is sought is a taking, or holding, of the plaintiffs' property, the availability of a suit for compensation against the sovereign will defeat

a contention that the action is unconstitutional as a violation of the Fifth Amendment."); *Hodel v. Va. Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981) ("[S]uch an alleged taking is not unconstitutional unless just compensation is unavailable."); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984).

Although the roots of the facial-claim exception to the second prong are not so deep, they extend back at least to this Court's decision in *Yee v. City of Escondido*, 503 U.S. at 534, in which it held that the plaintiff's facial takings claim was not subject to the *Williamson County* requirements.

The reasons for overruling one or both of these established lines of authority are insufficient to satisfy the "special justification" standard, particularly as it has been applied by this Court. There has not been "a significant change in, or subsequent development of, our constitutional law" that destroys the vitality of the principles upon which *Williamson County* and *San Remo* were decided. *See Agostini v. Felton*, 521 U.S. 203, 236 (1997). Similarly, the "precedents before and after [*Williamson County*'s or *San Remo*'s] issue" do not "contradict [their] central holding" in a way that creates uncertainty and erodes its foundations. *See Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *cf. id.* at 587 (Scalia, J., dissenting) ("[W]e should be consistent rather than manipulative in invoking the doctrine [of *stare decisis*].").

Appeals to fairness are a common element of arguments on the questions presented on this issue, with the suggestion that takings plaintiffs (or facial-claim defendants) are being treated unfairly. But access to federal courts for other types of plaintiffs did not expand in 1985 after *Williamson County*, or shrink in 2005 after *San Remo*, in a manner that created or exacerbated an unfairness or inconsistency. The world has not changed so "as to have robbed" these rules "of significant application or justification." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (plurality) (citing *Burnet*, 285 U.S. at 412 (Brandeis, J., dissenting)). These rules have not "proven to be intolerable simply in defying practical workability." *Casey*, 505 U.S. at 854 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

1. For the most part, the *Williamson County* requirements have worked.

The current tests for ripeness respect federalism interests. They give state and local governments the opportunity to respond to potential takings claims by steering them toward less-severe outcomes before a final decision, by providing an adequate right to recover just compensation, or both.

The requirements also accommodate the needs of overloaded federal courts. The litigation experiences of APA members indicate that typical regulatory takings claims are not facial challenges or suits presenting a viable claim of a categorical taking. Most often, they are fact-intensive claims most appropriately considered under the multi-factor intermediate-scrutiny analysis commonly attributed to *Penn Central Transportation*

Co. v. New York City, 438 U.S. 104 (1978). Except for a specialized court such as the U.S. Court of Federal Claims, federal district courts do not regularly review land-use decisions. State courts do. State courts generally possess the institutional expertise, desire, and patience to get "down in the weeds" as to factual issues, state and local procedural nuances, and the delicate balances demanded by the *Penn Central* factors.

Experience has also demonstrated that the process of meeting the *Williamson County* requirements often filters out meritless cases before they burden federal court dockets. Although it is unwise to paint with too broad a brush on a subject like this, it is commonplace to see unsuccessful applicants (or neighbors of successful applicants) equate a disappointing outcome of the land-use-approval process with an unconstitutional taking. Such plaintiffs rarely make the same mistake a second time, after a state court has educated them about the important differences between unfavorable outcomes and unconstitutional takings.

Williamson County's second prong has steered both property owners and government defendants toward those courts that are more apt to undo a confiscatory decision with the least amount of delay. Speedy invalidation is usually the most effective and cost-efficient remedy for an unlawful or otherwise confiscatory decision. State courts have little reluctance to invalidate the denial of a permit or other land-use application if the evidence demonstrates that the denial was unlawful, without the need to reach any constitutional questions. By contrast, the need for a substantial federal question often causes motion practice in federal court land-use lawsuits to address questions of federal law before questions of state law. Then, if the federal causes of action are dismissed at an early stage, often the relatively more promising claims (arising under state law, seeking invalidation) are reached, if at all, once the case is re-filed in (or remanded to) state court, usually after a further round of motions. If *Williamson County*'s second prong is eliminated, the most meaningful and appropriate type of relief will more often be delayed for the considerable number of land-use plaintiffs with claims that are valid under state zoning law, but fall short of constituting valid federal takings claims.

2. Nevertheless, excessive applications of the *Williamson County* second prong have occurred, which this Court can and should prevent.

a. Fifth Amendment takings jurisprudence must provide the floor when state courts decide state-law takings claims.

In *Williamson County*, this Court reaffirmed that the second prong only applies where "a 'reasonable, certain and adequate provision for obtaining compensation' exist[s] at the time of the taking." 473 U.S. at 194 (quoting *Cherokee Nation*, 135 U.S. at 659). Accordingly, "if a State provides an *adequate procedure* for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195 (emphasis added). The Court also described the requirement as "satisfied by a *reasonable and adequate provision* for obtaining compensation after the taking." *Id.* (emphasis added).

In evaluating the adequacy of state-law takings claims, this Court has not directly dealt with inadequate formulations of the takings tests at the local level. But this Court has implicitly recognized the role of federal takings jurisprudence when state courts decide state-law takings claims. This Court has granted certiorari to at least one state appellate court to review questions related to whether the petitioner may have a valid Fifth Amendment takings claim. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1939 (2017); *cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013) (granting certiorari and reversing Florida state court takings decisions under the unconstitutional conditions doctrine). Because the availability of review by this Court depended on the presence of a substantial *federal* question, implicit in the Court's ability to review decisions on takings claims first brought in state court under *state* law (presumably because of *Williamson County*'s second prong) is that Fifth Amendment takings jurisprudence must provide the floor for state-court decisions on whether a taking has occurred.

To help ensure the adequacy of takings litigation in state court under state law when required by *Williamson County*'s second prong, the Court should make explicit what was implicit in its grants of certiorari in *Koontz* and *Murr*: that when takings plaintiffs attempt to comply with the second prong, federal takings jurisprudence must provide the floor for state courts' evaluation of the plaintiffs' rights. Arguments that the Fifth Amendment would entitle the takings plaintiff to relief should be fully relevant to determinations of whether state law should be construed to allow relief. Therefore, they should be welcome in state-court proceedings undertaken pursuant to *Williamson County*'s second prong.

b. Takings plaintiffs should not be forced to use state procedures that, in practice, do not provide constitutionally meaningful avenues for obtaining compensation.

This Court has provided little guidance to lower federal courts about when a state-law cause of action falls short of being "reasonable," "certain," or "adequate" within the meaning of the second prong of *Williamson County*. In most (but not all) lower federal courts, once a particular state's inverse condemnation procedure was found "adequate" in at least one federal appellate ruling, in later cases the question of its adequacy was thereafter treated as established law, and seldom if ever revisited. ***See, e.g.*, *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006). *But see Coles v. Granville*, 448 F.3d 853, 865 (6th Cir. 2006)** (explaining the Sixth Circuit's evolving analysis of whether Ohio's mandamus remedy provides an adequate remedy under the *Williamson County* second prong).

In lieu of totally federalizing takings litigation, the Court should focus on the adequacy of state remedies to resolve those claims. The Court should seek out opportunities to clarify what is minimally necessary for a state-court procedure to be "reasonable," "certain," or "adequate" within the meaning of the second prong. This should include consideration of the timeliness of final adjudications of takings claims in a state's court systems.[3]

If state law fails to provide a potential compensation remedy for a genuine taking, the state procedures should be deemed inadequate, regardless of whether state law provides an avenue to overturn the decision that gives rise to the takings claim.

If the only potential compensation remedy provided under state law does not permit a plaintiff or petitioner to supplement the administrative record to include additional evidence related to whether there was a taking, that procedure should also be considered inadequate. Potential takings plaintiffs appearing before a local board or tribunal should not be forced to simultaneously prosecute an application for a land-use approval and build a complete factual record that denial of the application would constitute a taking.

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[3] The roots of *Williamson County*'s second prong reflect the relevance of the timeliness of potential compensation. *See Joslin Mfg. Co.*, 262 U.S. at 677 ("It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to *a reasonably prompt ascertainment and payment*. . . .") (emphasis added).

c. Plaintiffs and defendants should receive equivalent access to federal fora.

Lower federal courts have not been perfectly consistent in applying *Williamson County*'s second prong both to plaintiffs filing in the first instance in federal courts and to defendants removing cases to federal court. Critics of the second prong (and some lower federal courts) have interpreted *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), as permitting or requiring a double standard that allows defendants but not plaintiffs to obtain a federal venue for a takings claim.

The Court should side with those lower court rulings that have treated takings plaintiffs and defendants equally, and have not permitted a federal takings claim to become the sole basis for federal removal jurisdiction if that suit could not have been filed in federal court by the plaintiff.

Under a fair reading of *Williamson County* and *International College of Surgeons*, an unripe federal as-applied takings claim, by itself, cannot create federal jurisdiction—whether that jurisdiction is sought by a plaintiff or by a removing defendant.[4] Thus, when a defendant removes an as-applied takings suit (with no other ripe basis for federal jurisdiction), federal courts should order a remand because of a lack of federal jurisdiction. *See, e.g.*, *Eggleston v. Pierce Cnty.*, 99 F. Supp. 2d 1280, 1282 (W.D. Wash. 2000) ("I find that the removal by Defendants of plaintiff's inverse condemnation state claim to federal court is improper pursuant to the *Williamson County* ruling that unequivocally requires an exhaustion of state remedies before an attempt to obtain a remedy in federal court."). Correctly interpreted, the two decisions create no unequal access to federal courts, no unfairness, and no discrimination against plaintiffs. If, as in *International College of Surgeons*, the takings claim is joined with at least one other federal cause of action, and at least one of those claims is ripe, then the case may be filed in federal court or removed to federal court. In that setting as well, the access to federal courts of plaintiffs and defendants is equivalent.

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[4] Federal jurisdiction was present in *International College of Surgeons* **in spite of**, not because of, the plaintiff's inclusion of a federal takings claim. As lower court rulings in that case show, the plaintiff's complaint in that action included a variety of other federal causes of action, any one of which was sufficient to support federal jurisdiction and thus to support removal. *See Int'l Coll. of Surgeons v. City of Chi.*, Nos. 91 C 1587, 91 C 5564, 1992 WL 6729, at *4 (N.D. Ill. Jan. 10, 1992). Indeed, the federal takings claim

d. *Williamson County*'s second prong should apply only to takings claims.

Some lower federal courts have taken *Williamson County*'s second prong too far, applying it to constitutional claims that are not takings claims.

The textual justification for the *Williamson County* second prong is the special need for completeness due to the "without just compensation" clause. That

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had been dismissed by the district court in an early Rule 12(b)(6) ruling. *Id.* at *2.

justification arises from language in the Takings Clause of the Fifth Amendment that is not in the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. Despite that, some courts have extended *Williamson County*'s second prong to equal-protection or due-process claims. *See, e.g.*, *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 91 (5th Cir. 2011); *Patel v. City of Chi.*, 383 F.3d 569, 507 (7th Cir. 2004); *Country View Estates @ Ridge LLC v. Town of Brookhaven*, 452 F. Supp. 2d 142, 156 (E.D.N.Y. 2006). Indeed, a panel of the Seventh Circuit has gone so far as to announce (when affirming the dismissal of a procedural-due-process claim) that "[l]abels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994).

This Court should take the opportunity to make it clear that *Williamson County*'s second prong applies only to takings claims. As many U.S. Courts of Appeals have recognized, there is no reason to require the second prong of *Williamson County* in non-takings claims, because those constitutional rights have no counterpart to the "without just compensation" language of the Takings Clause. *See, e.g.*, *John Corp. v. City of Houston*, 214 F.3d 573, 584 (5th Cir. 2000); *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997); *Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996); *Acierno v. Mitchell*, 6 F.3d 970, 977 n.17 (3d Cir. 1993); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 96–97 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993); *Sinaloa*

Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404–07 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996).

◆

CONCLUSION

By overruling the general requirements of *Williamson County* or the facial-takings-claim exception in *San Remo*, the Court would risk injury to itself as an institution. As a plurality of this Court noted in *Casey*:

> There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

Casey, 505 U.S. at 864–66.

Instead, the Court should work within the framework of its existing precedents, to repudiate misinterpretations by a small number of lower federal courts, and to provide clearer guideposts to state courts when they consider state-law takings claims pursued because of *Williamson County's* second prong.

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May 31, 2018

No. 17-647

In the Supreme Court of the United States

ROSE MAY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the takings-specific ripeness doctrine developed in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), should be limited with respect to religious land-use litigation.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all religious faiths and the freedom of religious people and institutions to participate fully in public life. Becket has appeared before this Court as counsel in numerous religious liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

Included in its mission of protecting the freedom of religious people to participate fully in public life is vindicating the concomitant First Amendment right of religious people to find property to gather on and put to religious use. Becket has therefore long been involved in land-use litigation under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.* Becket brought the nation's first RLUIPA land-use case after the statute was enacted in 2000, see *Haven Shores Cmty. Church* v. *City of Grand Haven*, No. 1:00-cv-175 (W.D. Mich.) (consent decree signed Dec. 20, 2000); and since then has been involved in RLUIPA litigation on behalf of a wide variety of religious leaders and institutions whose religious land uses have been discriminated against or unnecessarily burdened. See, *e.g.*, *Elijah Grp., Inc.* v. *City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011) (counsel for small Christian church); *Guru Nanak Sikh Soc'y of*

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Petitioner and Respondents have consented to the filing of this brief.

Yuba City v. *Cty. of Sutter*, 456 F.3d 978 (9th Cir. 2006) (*amicus* supporting Sikh temple); *Murphy* v. *New Milford Zoning Comm'n*, 402 F.3d 342 (2d Cir. 2005) (*amicus* supporting Christian prayer-group organizers); *Islamic Ctr. of Murfreesboro* v. *Rutherford Cty.*, No. 3:12-cv-0737 (M.D. Tenn. 2012) (counsel for mosque which obtained temporary restraining order permitting it to open for Ramadan). Becket has also participated in other land-use litigation in which a decision against the property owner threatened damaging consequences for religious land use. See Br. for the Becket Fund for Religious Liberty as *Amicus Curiae*, *Kelo* v. *City of New London*, 545 U.S. 469 (2005) (No. 04-108).

Becket is concerned with this case because the *Williamson County* bar on takings claims challenged by Petitioner here has been applied by some lower courts not just to takings claims, but to RLUIPA and related First Amendment claims as well. These applications of *Williamson County* flout both the rationale underlying the *Williamson County* decision and the statutory language and purpose of RLUIPA. Becket files this brief to inform the Court of the variety of different applications the much-criticized *Williamson County* doctrine has spawned in the lower courts, and to explain that, whatever the continuing vitality of *Williamson County* after the Court's decision in this case, the Court should make clear that there is no justification for applying the doctrine to non-takings claims like those under RLUIPA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If "a precedent is not always extended to the limit of its logic," *Hein* v. *Freedom From Religion Found.*, *Inc.*, 551 U.S. 587, 614-15 (2007), still less should lower courts extend this Court's precedent *beyond* those logical limits. Yet that's exactly what has happened with this Court's decision in *Williamson County*. "In the 30 years since the Court decided *Williamson County*, individual Justices have expressed grave doubts about the validity of that decision and have called for reconsideration." *Arrigoni Enters., LLC* v. *Town of Durham*, 136 S. Ct. 1409, 1412 (2016) (Thomas, J., dissenting from denial of certiorari). Yet over that same period, many lower courts have expanded *Williamson County*'s application, uprooting it from its native soil of the Takings Clause and planting it in the path of unfortunate plaintiffs pressing a variety of different claims, from due process to equal protection to RLUIPA land-use claims.

But the transformation of *Williamson County* into an all-purpose land-use doctrine finds no basis in the rationale of the opinion itself, which imposed its extra-Article III requirements of finality and exhaustion as a means of determining when an unconstitutional "tak[ing]" "without just compensation" has occurred. See U.S. Const. amend. V. And it is especially troubling in the RLUIPA context. RLUIPA gives religious land-use plaintiffs a statutory cause of action to challenge "discriminat[ion] against" and "substantial burden[s]" on their religious land use, 42 U.S.C. § 2000cc—not takings. And religious plaintiffs are especially vulnerable to the sort of "gamesmanship" on the part of government officials that *Williamson County* encourages, see *Arrigoni*, 136 S. Ct. at 1411, because the unique characteristics of houses of worship make them uniquely unpopular with local zoning officials. See generally Douglas Laycock & Luke W.

Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021 (2012).[2]

This case presents the opportunity for this Court to put an end to *Williamson County* creep. *Amicus* agrees with Petitioner that *Williamson County* should be overruled at least in part, even as applied in its original, Takings Clause context. But to whatever extent *Williamson County* survives the Court's decision here, the Court should reiterate that *Williamson County* is a Takings Clause doctrine, not a general amendment to Article III applicable to all land-use claims irrespective of their source. Doing so would allow this Court's decision to not only remove an "imped[iment to] the orderly development of takings law," Pet. 2, but also to correct a misreading of this Court's precedent that, in the RLUIPA context, has generated open disagreement and uncertainty among the circuits.[3]

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[2] RLUIPA's prisoner provisions, 42 U.S.C. § 2000cc-1, are not at issue here. Exhaustion of remedies in the prison context is governed by the Prison Litigation Reform Act, 42 U.S.C. § 1997e. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 723 n.12 (2005).

[3] Compare *Murphy* v. *New Milford Zoning Comm'n*, 402 F.3d 342, 347-50, 352 (2d Cir. 2005) (finding *Williamson County* "appropriate to apply" to plaintiffs' RLUIPA claims); *Congregation Anshei Roosevelt* v. *Planning & Zoning Bd.*, 338 F. App'x 214, 217-19 (3d Cir. 2009) (following *Murphy*); *Grace Cmty. Church* v. *Lenox Twp.*, 544 F.3d 609, 613-18 (6th Cir. 2008) (same); *Guatay Christian Fellowship* v. *Cty. of San Diego*, 670 F.3d 957, 976-79 (9th Cir. 2011)

ARGUMENT

I. Flawed even in the takings context, *Williamson County* has metastasized to interfere with other land-use claims, including RLUIPA claims.

Williamson County is a takings-specific doctrine motivated by takings-specific concerns. Petitioner convincingly explains why the doctrine is misguided even in its original takings context, and preexisting rules of Article III ripeness should apply. Pet'r's Br. 33-41. *Amicus* writes to add that *Williamson County* should be overruled or limited not just because it has caused problems in the Takings Clause context, but also because its problems have proliferated. Courts around the country have applied it not just to takings claims, but to land-use disputes more generally—including claims under RLUIPA.

The *Williamson County* doctrine is about the meaning of the Takings Clause, not other constitutional provisions, and not federal statutes. In *Williamson*

(same) with *Roman Catholic Bishop of Springfield* v. *City of Springfield*, 724 F.3d 78, 91-93 & n.12 (1st Cir. 2013) (Lynch, J.) (declining to apply *Williamson County*'s "specialized Takings Clause ripeness doctrine" to RLUIPA claim); *Temple B'Nai Zion, Inc.* v. *City of Sunny Isles Beach*, 727 F.3d 1349, 1356-57 (11th Cir. 2013) (finding *Williamson County* "an inappropriate tool for the" RLUIPA claim presented there). See also *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 287 n.7 (5th Cir. 2012) (noting the application of *Williamson County* to RLUIPA and First Amendment claims "is an open question in this circuit").

County, the Court set out "two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court." *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997). First, "a plaintiff must demonstrate that she has * * * received a 'final decision regarding the application of the [challenged] regulations to the property at issue' from 'the government entity charged with implementing the regulations.'" *Id.* at 734 (quoting *Williamson Cty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985)). This hurdle requires that the plaintiff "follow the procedures for requesting the applicable zoning relief, and have its request denied, before bringing a claim in court." *Roman Catholic Bishop of Springfield*, 724 F.3d at 91 (Lynch, J.). Second, she must have "sought 'compensation'" for the alleged taking "'through the procedures the State has provided for doing so.'" *Suitum*, 520 U.S. at 734 (quoting *Williamson County*, 473 U.S. at 194). Both requirements purported to derive from the specific language of the Fifth Amendment: the first "follows from the principle that only a regulation that 'goes too far' results in a *taking*" in the first place; and the second "stems from the Fifth Amendment's proviso that only takings without '*just compensation*' infringe that Amendment." *Ibid.* (emphasis added, citation omitted).

The *Williamson County* doctrine thus was designed to help courts determine when a plaintiff has suffered a particular type of injury: a "taking" without "just compensation." But some lower courts—invoking "policy considerations" set out in *Williamson County*—have held that the doctrine should not be "so strictly confined." *Murphy*, 402 F.3d at 349.

On this reasoning, lower courts have applied *Williamson County* to "various types of land use challenges," including challenges based on substantive due process, procedural due process, equal protection, and the "First Amendment rights" of assembly and free exercise. *Murphy*, 402 F.3d at 350, 353. Perhaps most perversely, numerous courts have applied the *Williamson County* doctrine to claims under RLUIPA—a statute enacted by Congress for the precise purpose of minimizing the expense, uncertainty, and delay commonly incurred by houses of worship at the hands of local zoning officials. See *Temple B'Nai Zion*, 727 F.3d at 1356 (collecting cases); see also, generally, Laycock & Goodrich, 39 Fordham Urb. L.J. 1021. This misapplication of *Williamson County* has generated open disagreement in the circuits, with the First and Eleventh Circuits declining to apply *Williamson County*'s "specialized Takings Clause ripeness doctrine" to RLUIPA claims, even while noting that the Second, Third, Sixth, and Ninth Circuits have done so. *Roman Catholic Bishop of Springfield*, 724 F.3d at 91-93 & n.12; see also *Temple B'Nai Zion*, 727 F.3d at 1357.

This misapplication began with *Murphy*, in which the Second Circuit "recognize[d] that the Supreme Court developed the *Williamson County* ripeness test in the context of a regulatory takings challenge," but nonetheless applied the decision to RLUIPA claims based on "policy considerations." 402 F.3d at 348-50. The court did so without considering whether those policy considerations were consistent with the statute Congress enacted. *Ibid.* And although the *Murphy* court acknowledged that it needed to be "cautious[]" in extending *Williamson County* outside the takings context, it purported to exercise that caution by articulating a two-step "preliminary inquiry" that it would apply before applying *Williamson County* in RLUIPA cases, *id.* at 350-51—making the process of deciding whether a RLUIPA claim is ripe still more complex and creating confusion even among the courts that follow *Murphy*. See *Opulent Life Church*, 697 F.3d at 287 n.7; *New Life Evangelistic Ctr., Inc.* v. *City of St. Louis*, No. 4:15-cv-00395, 2015 WL 6509338, at *3-6 (E.D. Mo. Oct. 27, 2015) ("[A]lthough the Ninth Circuit has chosen to apply *Williamson* without further inquiry, this Court will adopt the cautious approach of the Second and Sixth Circuits.").

The concerns that motivated Congress to pass RLUIPA are at loggerheads with the procedural hurdles erected by the application of *Williamson County*. Indeed, application of *Williamson County* to RLUIPA claims is often inconsistent with the terms of RLUIPA itself. Under RLUIPA, a plaintiff makes out a prima facie case if she shows that a land-use regulation discriminates against religion, or that a land-use regulation has been "impose[d] or implement[ed] in a manner that imposes a substantial burden on" her "religious exercise." 42 U.S.C. § 2000cc(a)(1), (b). And these injuries may become manifest even before the plaintiff has cleared the *Williamson County* hurdles.

Regarding discrimination, this Court explained just last Term that religious discrimination is an injury in itself, one which occurs at the point when a religious organization is prohibited from being treated on equal grounds with secular organizations. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017). This Term, the Court explained that Free Exercise Clause violations may occur during the administrative review process itself, when religious entities are deprived of "full and fair consideration" of their claims. *Masterpiece Cakeshop Ltd.* v. *Colo. Civil Rights Comm'n*, No. 16-111, slip op. 18, 584 U.S. ___ (June 4, 2018). And regarding substantial burdens, local procedures for applying for zoning relief may be futile in a particular case, or zoning officials' conduct may give rise to questions of bias, or a house of worship may face an unusual application process so byzantine or prohibitively expensive that being forced to comply with the process would *itself* constitute a substantial burden. (We discuss several such examples in Part II.B. below.) To apply *Williamson County* in these circumstances—and thus to dismiss a plaintiff's RLUIPA claim unless she complies with the very procedures alleged to be substantially burdensome—is to nullify Congress's handiwork.

Several cases illustrate the point.

In *Miles Christi Religious Order* v. *Township of Northville*, 629 F.3d 533 (6th Cir. 2010), the Sixth Circuit applied *Williamson County* to dismiss a religious order's Free Exercise and RLUIPA claims. There, zoning authorities determined that a small religious order's longstanding use of a home had "intensified" to the level of "a small church or place of worship," and thus that the order would have to "go through the town's site review process, beginning by submitting a site plan, to ensure" that the property met the heightened requirements. *Id.* at 543 (Batchelder, J., dissenting). But "completing and submitting the site plan itself" would cost $30,000, such that the fathers and brothers were "being put to the choice of either paying for an expensive site plan or curtailing or eliminating [their] religious activities." *Id.* at 543, 546. Further, the religious order alleged that the intensity determination was based on discriminatory animus, an allegation that was supported by the government's "troubling" statements at oral argument. *Id.* at 540 (majority); *id.* at 549 (Batchelder, J., dissenting). Still, the court held that the order's Free Exercise and RLUIPA claims were unripe under *Williamson County*, and that the order must either submit a site plan or appeal the intensity determination before asserting a RLUIPA claim, simply to continue the same religious exercise it had conducted at the property for years. *Id.* at 537-42.

Another example is *Guatay Christian Fellowship* v. *County of San Diego*, 670 F.3d 957 (9th Cir. 2011). There, the plaintiff church held services on its property for 22 years without incident, but was then informed it must undergo a burdensome and cost-prohibitive permitting process to continue using the building as a church. Specifically, in 2008, after more than two decades of unchanged land use, zoning authorities warned the church that its "continued operation" on the property was "illegal," and threatened to "cut all electrical power to the Church complex" if the church continued meeting there without obtaining a special-use permit. *Id.* at 965. But completing the process of applying for a special-use permit—including paying the "fees," resolving the "project issues," and handling the "public reviews that had to be completed before a Use Permit could issue"—would cost the church "between $214,250 and $314,250" and take "approximately fourteen months to three years." *Id.* at 967-68. Nonetheless, applying *Williamson County*, the Ninth Circuit dismissed the church's RLUIPA claim, holding that because the church had not applied for a special-use permit, its "RLUIPA claims [were] unripe." *Id.* at 976-80.

Miles Christi and *Guatay* are representative of the problems inherent in applying *Williamson County* to RLUIPA claims, but they are not alone. A number of lower-court decisions have applied *Williamson County* in similar circumstances. See, *e.g.*, *Congregation Anshei Roosevelt*, 338 F. App'x at 217-19; *Life Covenant Church, Inc.* v. *Town of Colonie*, No. 1:14-CV-1530, 2017 WL 4081907, at *5-9 (N.D.N.Y. Sept. 13, 2017); *Congregation Rabbinical College of Tartikov, Inc.* v. *Vill. of Pomona*, 915 F. Supp. 2d 574, 597-607 (S.D.N.Y. 2013) (dismissing RLUIPA claim under *Williamson County* even though "troubling" statements by officials indicated that the challenged ordinance was passed specifically to exclude the plaintiff Jewish congregation); *Cassidy* v. *City of Brewer*, No. 1:12-cv-137, 2012 WL 5844897, at *1 & n.3 (D. Me. Nov. 19, 2012).

These cases fail to grapple with the fact that *Williamson County*'s finality and exhaustion requirements were designed to determine when a plaintiff had suffered a particular type of injury—an uncompensated taking. Those requirements are simply out of place when applied to a statute that addresses *different* injuries that may crystalize sooner than a taking. And RLUIPA is just such a statute. In RLUIPA cases involving religious discrimination, the relevant injury is the government's failure to treat religious land use on equal footing with nonreligious use—an injury that could easily be complete long before *Williamson County*'s procedural restrictions are satisfied. See *Trinity Lutheran*, 137 S. Ct. at 2022.

And in substantial-burden cases, there are many situations in which requiring the plaintiff to comply with *Williamson County* could *itself* substantially burden the plaintiff's religious exercise. A burden may be "substantial" if it "places considerable pressure on the plaintiff to" forgo the exercise, *Yellowbear* v. *Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.)—a standard that is met by land-use actions that create excessive or unusual hurdles to the use of a property for religious worship. See, *e.g.*, *Bethel World Outreach Ministries* v. *Montgomery Cty. Council*, 706 F.3d 548, 552-54, 555-58 (4th Cir. 2013) (county changed its laws twice in response to African-American church's application, rendering that application futile); *Westchester Day Sch.* v. *Vill. of Mamaroneck*, 504 F.3d 338, 348-53 (2d Cir. 2007) (zoning authorities' "stated willingness to consider a modified proposal was disingenuous," rendering modified application unnecessary). To the extent that complying with *Williamson County*'s finality requirement by following local procedures for seeking the applicable zoning relief would itself place considerable pressure on the plaintiff to simply forego the religious exercise altogether, applying *Williamson County* to RLUIPA claims is inconsistent with RLUIPA.

This is not to say that every court has extended *Williamson County* to religious land-use claims. In fact, there is a circuit split over the issue, as several courts have recognized that *Williamson County* is "an inappropriate tool for" RLUIPA claims. *Temple B'Nai Zion*, 727 F.3d at 1357; see also *Roman Catholic Bishop of Springfield*, 724 F.3d at 92; *Sisters of St. Francis Health Servs., Inc.* v. *Morgan Cty.*, 397 F. Supp. 2d 1032 (S.D. Ind. 2005); cf. *Israelite Church of*

God in Jesus Christ, Inc. v. *City of Hackensack*, No. 11-5960, 2012 WL 3284054, at *2 (D.N.J. Aug. 10, 2012) ("*Williamson* is not on all fours, as [a RLUIPA] case is not a takings case.").

For instance, in *Roman Catholic Bishop of Springfield*, the First Circuit refused to apply *Williamson County*'s "specialized Takings Clause ripeness doctrine" to a RLUIPA claim. 724 F.3d at 91. Judge Lynch explained that *Williamson County*'s finality requirement "is compelled by the very nature of the inquiry required by the Just Compensation Clause," *id.* at 91-92 (quoting *Williamson County*, 473 U.S. at 190); while a law's effect on "free exercise rights may well become clear at a different point than that contemplated by takings law," *id.* at 92. The First Circuit held that the burden on the church's free exercise rights had indeed become clear even though the church had not complied with *Williamson County*'s finality requirement, because requiring it to apply for an exception to the challenged land-use regulation before suing (as *Williamson County* would) would "impose[] delay, uncertainty, and expense" and force it to "subject[] its religious decisions * * * to secular administrators." *Id.* at 92-93. This meant that there was "a present burden on" the plaintiff's "free exercise of religion." *Id.* at 92.

Likewise, the Eleventh Circuit in *Temple B'Nai Zion* declined to apply *Williamson County* to a RLUIPA claim, finding it "an inappropriate tool for the specific facts presented" there. 727 F.3d at 1357. The court reasoned that because the plaintiff alleged that the challenged land-use decision—the designation of its property as a historical landmark—"was motivated by discriminatory animus, *Williamson County* is inappropriate because the injury is complete upon the municipality's initial act." *Ibid.* The court therefore reversed the district court's decision that the plaintiff's claim was unripe, even though it was undisputed that the plaintiff had failed to seek a variance from or waiver of the building restrictions concomitant with the landmark designation before suing. *Id.* at 1355.

Finally, the district court's decision in *Sisters of St. Francis Health Services* is to similar effect. There, the court held that a religious order whose mission was to heal the sick could bring a RLUIPA challenge even before it applied for county approval to expand its hospital. 397 F. Supp. 2d at 1035, 1047-49. The court explained that because the plaintiff had presented evidence that the "application procedure *itself* is ill-defined, vague, and imposes a substantial burden on [the plaintiff's] plans for expansion, including effects on its construction schedule and recruitment of personnel," *Williamson County* could not require it to comply with that procedure. *Id.* at 1048 (emphasis added).

The courts on this side of the split properly recognize the limitations of *Williamson County.* This Court "has only applied *Williamson County*'s finality rule to regulatory takings claims," *Opulent Life Church,* 697 F.3d at 287 n.7—and for good reason, since *Williamson County*'s finality and exhaustion requirements are, according to *Williamson County* itself, "compelled by the very nature of the inquiry required by" the Fifth Amendment. 473 U.S. at 190. But RLUIPA requires a different inquiry, and to apply *Williamson County* to RLUIPA claims is to create "a gaping loophole" in the statute that would give zoning authorities "license to impose illegal burdens by delaying the land use approval process endlessly." *Israelite Church of God,* 2012 WL 3284054, at *5. By reiterating that *Williamson County* is limited to the takings context, this Court can take an important step toward ensuring that those whose religious exercise has been discriminated against or substantially burdened by a land-use regulation are able to seek a prompt remedy in court, as the plain text of RLUIPA requires.[4]

II. *Williamson County* is particularly inappropriate in the context of RLUIPA land-use claims.

The cases that have applied *Williamson County* to RLUIPA land-use claims have done so based on four "policy considerations" first outlined in the Second Circuit's decision in *Murphy*. But the *Murphy* approach is contrary to the policy Congress created with RLUIPA. Both the text and legislative history of RLUIPA demonstrate that Congress did not intend to impose *Williamson County*-esque procedural hurdles on RLUIPA plaintiffs. Further, the application of RLUIPA over the last seventeen years demonstrates that Congress's concerns were well founded, and proper application of the statute is necessary to protect houses of worship from burdensome restrictions, arbitrary decisionmaking, and covert discrimination.

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[4] This is not to suggest that religious organizations should have a free pass to sue under RLUIPA without first making any efforts to comply with local zoning procedures. For one thing, traditional Article III standing and ripeness would apply to bar claims where the injury is merely hypothetical or speculative. See *Roman Catholic Bishop of Springfield*, 724 F.3d at 90-91 (rejecting the application of *Williamson County*'s additional ripeness requirements to an RLUIPA case, but applying Article III's requirements). In addition, RLUIPA itself provides a limit by requiring that actionable burdens on religious exercise be *substantial*.

A. RLUIPA was intended to remedy burdensome and discriminatory actions by local land-use authorities.

RLUIPA was passed by both houses of Congress unanimously and signed into law by President Clinton in 2000. Laycock & Goodrich, 39 Fordham Urb. L. J. at 1022-23 & nn.4-5 (2012). The law brought together a coalition of ideologically diverse groups united in support of religious freedom. In enacting RLUIPA, Congress emphasized that the right to acquire property is inexorably connected to the rights protected by the First Amendment. As Senators Kennedy and Hatch explained, "[t]he right to assemble for worship is at the very core of the free exercise of religion" and the ability to acquire "physical space adequate to * * * [a congregation's] needs" is an indispensable adjunct of the core First Amendment right to assemble for religious purposes. 146 Cong. Rec. 16698 (2000) (Joint Statement of Senators Hatch and Kennedy).

Over more than three years, Congress held numerous rounds of hearings which found "massive evidence" of discrimination against religious persons and organizations by both local and state officials in land-use decisions. 146 Cong. Rec. 16698. This burden fell particularly on smaller or unfamiliar denominations. *Id.*

Congress found that existing zoning laws excluded churches from certain areas completely or left the right to worship at the hands of local land-use regulators who had broad discretion in granting necessary permits. H.R. Rep. No. 106-219 at 19 (hearings regarding the Religious Liberty Protection Act of 1999, a precursor to RLUIPA). Zoning boards and other local land-use authorities regularly used their "authority in discriminatory ways." 146 Cong. Rec. 16698. Such discriminatory burdens were "often covert" and difficult to detect, *id.* at 16699, because discrimination often "lurks behind such vague and universally applicable reasons as traffic, aesthetics" or the common refrain that a religious land use is "not consistent with the city's land use plan." *Id.* at 16698. Such land-use processes were "not controlled by neutral and generally applicable rules" and therefore were "often vague, discretionary, and subjective." H.R. Rep. No. 106-219 at 24.

The hearings revealed several egregious examples of such behavior, such as a city rezoning a parcel for the sole purpose of excluding a church, and a city issuing a building permit to a church and then revoking the permit—after the church had begun building—because of an alleged parking requirement miscalculation. H.R. Rep. No. 106-219 at 20. Congress also heard evidence of the severe burden caused by procedural delays. For instance, houses of worship often struggled to pay a costly lease or commit to a mortgage to hold a property they could not use as the process dragged on. *Id.* Congress sought to ease these procedural and substantive burdens by enacting RLUIPA. See Laycock & Goodrich, 39 Fordham Urb. L.J. at 1022.

Unlike the prisoner provisions of RLUIPA, which on their face incorporate the Prison Litigation Reform Act's requirement that prisoners exhaust all prison remedies before bringing an RLUIPA claim, see *Cut-*

ter, 544 U.S. at 723 n.12, the land-use provisions contain no exhaustion requirement. RLUIPA's lack of an exhaustion requirement for land-use claims parallels other civil-rights claims brought under 42 U.S.C. § 1983—a statute the Supreme Court has held does not require exhaustion. *Patsy* v. *Bd. of Regents of Fla.*, 457 U.S. 496, 507 (1982); Pet'r's Br. 27. Accordingly, many courts have held that exhaustion of state remedies is not required under RLUIPA. *Jesus Christ Is The Answer Ministries, Inc.* v. *Baltimore Cty.*, No. CV RDB-17-3010, 2018 WL 1521873, at *8 (D. Md. Mar. 27, 2018) (collecting cases). Unfortunately, by applying *Williamson County*, courts have imposed exhaustion-type requirements where Congress enacted none.

B. Application of *Williamson County* to RLUIPA may encourage the use of burdensome and discriminatory procedures.

The use of *Williamson County* in RLUIPA cases is not only contrary to the statute's text and purpose, it may actually encourage precisely the sort of behavior that RLUIPA was passed to remedy. The now seventeen-year history of RLUIPA's application demonstrates that some local governments continue to abuse zoning and permitting processes to attempt to exclude religious organizations. This "slow burn of bureaucratic tedium" can be "devastating" for religious land use.[5] And it may grow worse if cities can avoid RLUIPA "just by running applicants in infinite circles" rather than denying applications outright. *Israelite*

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[5] Emma Green, *The Quiet Religious-Freedom Fight That Is Remaking America*, The Atlantic (Nov. 5, 2017), https://goo.gl/VFmwZy.

Church of God, 2012 WL 3284054, at *5. Several prominent examples illustrate how municipalities can improvise additional procedural hurdles.

The case of *Congregation Etz Chaim* v. *City of Los Angeles* is one such example. The congregation's struggle to establish a synagogue began long before RLUIPA was enacted—and indeed was one of the examples that key sponsors such as Senator Kennedy and Representative Hyde invoked to show the need for the statute.[6] Congregation Etz Chaim first applied for a conditional-use permit to operate its synagogue in 1996, but its application was denied three times. *Congregation Etz Chaim* v. *City of Los Angeles*, No. CV97-5042 CAS (Ex), 2009 WL 1293257, at *1 (C.D. Cal. May 5, 2009). After RLUIPA passed, the city settled, but local residents banded together to challenge the settlement. *League of Residential Neighborhood Advocates* v. *City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007). The Ninth Circuit held for the challengers and invalidated the settlement, but left open the possibility that the settlement could go forward if the congregation could demonstrate a RLUIPA violation. *Id.* at 1057-58.

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[6] See Protecting Religious Freedom After *Boerne* v. *Flores*, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 32-36 (1998) (statement of Rabbi Chaim Baruch Rubin, Congregation Etz Chaim, Los Angeles, California); see also H. Rep. No. 106-219, at 22 (discussing the Etz Chaim case); 146 Cong. Rec. S6678-02, S6689 (daily ed. July 13, 2000) (statement of Sen. Kennedy criticizing the city for "putting the neighborhood effectively off-limits for Orthodox Jews"); 146 Cong. Rec. E1564-01, E1566 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde).

Etz Chaim then filed a new application for a conditional-use permit and attempted to revive the settlement under RLUIPA. *Congregation Etz Chaim*, 2009 WL 1293257, at *4-5. But the district court concluded that—even though the case had been going on for *thirteen years* at that point—Etz Chaim's claims were still unripe under *Williamson County*. *Id.* at *6-7. Because the congregation had again applied for a permit, the court determined that it could not yet decide the legality of the first three permit denials or the validity of the settlement agreement. Unsurprisingly, the permit was once again denied—but the city then argued that those claims were res judicata. *Congregation Etz Chaim* v. *City of Los Angeles*, No. CV 10-1587 CAS (Ex.), 2011 WL 12462883, at *6-7 (C.D. Cal. Jan. 6, 2011). Finally, in July 2011, ten years after RLUIPA's passage and fifteen years after the congregation's initial application, the synagogue obtained a ruling upholding its right to a conditional-use permit under RLUIPA. *Congregation Etz Chaim* v. *City of Los Angeles*, No. CV10-1587 CAS EX, 2011 WL 12472550, at *10 (C.D. Cal. July 11, 2011).

The decade-and-a-half struggle of Etz Chaim shows not only why RLUIPA is necessary, but also how *Williamson County* can be used to thwart application of the statute. Because the synagogue made a second good-faith attempt to seek a permit, it was subjected to additional litigation and uncertainty.

Etz Chaim's example is extreme, but it is not alone. Other RLUIPA plaintiffs have been subjected to years of burdensome and sometimes futile land-use processes. These cases illustrate why the application of *Williamson County's* extra-Article III procedural hurdles are especially inappropriate in the RLUIPA context.

The case of Castle Hills First Baptist Church shows how city planners can use land-use processes and multiple permit procedures to create hurdles to religious land use, rendering the process itself substantially burdensome. When Castle Hills sought to expand to accommodate its growing church and school, the city amended its ordinances to prevent construction. See *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *13 (W.D. Tex. Mar. 17, 2004). The city created delays and issued conflicting decisions; at one point, the city allowed the church to build an additional floor on its new building, but refused to entertain an application for the use of that floor. *Id.* at *4. After Castle Hills filed a lawsuit under RLUIPA, the church and the city were ordered into mediation, and Castle Hills was required to submit three additional applications. *Id.* at *6. The city waited a year, then rejected those applications, too. *Ibid.* The matter was eventually resolved years later, on summary judgment in federal court.

For Castle Hills, the process from purchase to "final" denial took nearly four years. And each step of the way the city imposed additional requirements on the church. The continued application of *Williamson County's* finality requirement to RLUIPA claims would allow, or even encourage, hostile city officials to take actions similar to those of the City of Castle Hills, prolonging procedures and demanding that religious organizations make repeated and futile appeals.

The application of *Williamson County* is especially inappropriate in light of the history of RLUIPA cases in which local governments changed the rules during the permitting process. An egregious example is that of World Outreach Conference Center, a Christian church and community center operating in inner-city Chicago. The church bought the building from the YMCA and continued using it in substantially the same fashion as its previous owner. But when the church applied for a permit, the city refused and amended its zoning ordinance to exclude community centers—and then filed a lawsuit against *the church*, which the Seventh Circuit characterized as "frivolous." *World Outreach Conference Ctr.* v. *City of Chicago*, 591 F.3d 531, 536 (7th Cir. 2009). The city's irrational bias against World Outreach even led it to deny FEMA's request to use the center to shelter Hurricane Katrina victims. *Ibid.*

Similarly, Montgomery County, Maryland, changed its rules repeatedly to prevent the construction of a new house of worship for Bethel World Outreach Church—a church with many African-American members in a less diverse part of the county. Bethel purchased land zoned for church use, but when it applied for water and sewer connections, the county denied its application and, in the same council meeting, amended the ordinance to prohibit large institutions from obtaining water and sewer connections in that zone. *Bethel World Outreach Ministries*, 706 F.3d at 553. Bethel then applied to build a smaller church that could operate on private well and septic connections. While its application was pending, the county once again changed the rules to prohibit any institutions from building in the zone, regardless of water source, and "deferred" Bethel's application indefinitely. *Id.* at 553-54. The Fourth Circuit later recognized that the county's actions likely violated RLUIPA and that the deferral was an effective denial. *Id.* at 557-59.

All these cases demonstrate how local governments may change the rules of the game to frustrate land-use applications and render them futile. The application of *Williamson County* to such situations would deprive houses of worship of the remedy Congress crafted and embolden unlawful behavior by local officials. Local land-use commissions and city councils frequently subject religious organizations to a shifting and Kafkaesque kaleidoscope of restrictions and limitations.

Further, because local planning boards are particularly susceptible to the whims of public pressure or the biases of individual commission members, see Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 Harv. J.L. & Pub. Pol'y 717, 736 (2008), the process is ripe for abuse against disfavored religious organizations—perhaps explaining why a strikingly disproportionate number of RLUIPA land-use cases involve religious minorities. Laycock & Goodrich, 39 Fordham Urb. L.J. at 1029 (although "Jews, Muslims, Buddhists, and Hindus constitute only about 3% of the United States population," "in the first ten years under RLUIPA, they represented 34% of DOJ's caseload" enforcing the statute). As Congress found when it enacted RLUIPA, local land-use decisionmaking was "not controlled by neutral and generally applicable rules" and was "often vague, discretionary, and subjective." H.R. Rep. No. 106-219 at 24. These "often covert" burdens are precisely what RLUIPA is intended to remedy, and *Williamson County* stands in the way.

CONCLUSION

RLUIPA was enacted to protect houses of worship from constitutional violations. *Williamson County*'s finality and exhaustion requirements interfere with that relief and are incompatible with the civil rights protections that RLUIPA guarantees. Even if this Court retains *Williamson County* in the takings context, it should nevertheless take the opportunity to emphasize that such additional procedural restrictions are inapplicable outside of that context, especially when critical rights such as the right of religious freedom are at stake.

Respectfully submitted.

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JUNE 2018

No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE STATES OF CALIFORNIA, DELAWARE, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, UTAH, VERMONT, WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Court should overrule the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), requiring property owners to pursue compensation remedies that are available in state court before bringing takings claims in federal court.

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INTERESTS OF AMICI

Amici States are committed to preserving property owners' rights under both federal and state law.[1] At the same time, in our federal system States and their local subdivisions have the primary responsibility both for property law and for adopting reasonable, locally appropriate regulations for land use, public safety, environmental protection, and public health. Where an owner claims that the application of a state or local regulation affects property in a way that amounts to an unconstitutional taking, States have a strong interest in addressing the claim through their own procedures so that the regulation's legality can be determined under state law, any necessary or preferred accommodation between the regulatory scheme and the owner's rights can be made, and any required compensation can be ascertained and paid. These steps can be accomplished, and any just compensation provided, without any federal takings claim ever developing.

States have longstanding, clearly-established procedures by which property owners may raise challenges to state and local regulations in state court, including claims that the application of a regulation is functionally equivalent to an appropriation of private property for public use that requires just compensation. State courts also have extensive experience applying state law procedures and rules for determining what compensation is just, if a taking is found. Such proceedings enforce state-law restrictions on the exercise of state or local power and afford property owners readily available remedies, including just compensation. They allow state courts, applying state laws, to determine issues that are logically prior to the existence of, and certainly necessary to the resolution of, any potential later federal takings claim. This permits the proper development and application of state law and, by allowing for just compensation via state remedies, it potentially precludes a federal constitutional violation from ever occurring.

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[1] *See, e.g.*, Cal. Const. art. I, § 1 (listing, among people's "inalienable rights," the right to "acquir[e], possess[], and protect[] property"); *id.* § 19(a) (requiring just compensation when private property is taken for public use); Mass. Const. pt. 1, art. X (listing, among people's "essential and unalienable rights," the right to "acquir[e], possess[], and protect[] property"); N.Y. Const. art. I, §7(a) ("Private property shall not be taken for public use without just compensation.").

This Court's decision in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172, 194-96 (1985), protects these powerful state interests by ensuring that state processes have an opportunity to fully address and resolve any potential takings claim. Overruling the portion of ***Williamson County*** challenged in this case would undercut state primacy in core areas of property law and state and local regulation and limit States' ability to enforce their own restrictions on state or local regulatory action. It would force the federal courts to prematurely entertain takings claims based on the federal constitution and effectively act as super boards of zoning appeals addressing uniquely state law issues.

Indeed, the very existence of a takings claim is often highly contingent on complex legal and factual questions arising under state law, remedies under state law, and, importantly, whether a state or local regulator would prefer to pay permanent compensation or alter or rescind a regulation. ***Williamson County*** properly recognizes that such questions are much more appropriately addressed first through state proceedings. Setting aside this rule from *Williamson County* would improperly hinder the States in their efforts to simultaneously define and enforce property rights, regulate appropriately for the public health, safety, and welfare in accordance with local conditions, and protect the public fisc. The amici States have a strong interest in urging this Court to avoid that result.

SUMMARY OF ARGUMENT

Williamson County provides that a party asserting an unconstitutional taking of property must use state processes for seeking compensation before filing a federal lawsuit. The *Williamson County* rule reflects the character of the protection afforded by the federal Takings Clause, which makes a taking of private property for public use a violation of the federal constitution only if it is uncompensated. Unless and until a claimant has pursued the state compensation process, a claimant cannot state a colorable federal Takings Clause claim in federal court. This rule respects and upholds the sovereignty of the States by preventing them or their subdivisions from defending federal lawsuits when the alleged constitutional violation has not yet occurred and, depending on the outcome of the state compensation process, may never occur.

To that end, *Williamson County* recognizes two specific preconditions for a claim that a state or local regulation interferes with property rights in a way that requires compensation under the federal Takings Clause. First, the state or locality must have made a final decision about how it will apply the regulation to the property at issue, including a determination of the applicability of any variances. Second, the owner must have pursued any reasonable, certain, and adequate state procedure for obtaining compensation for any alleged taking.

These rules reflect the substantive elements of the Takings Clause. A violation of that clause requires both a taking of property and a failure to pay just compensation. State courts typically have the power under state law to set aside regulatory actions that have given rise to takings claims, or to order the payment of just compensation. Until state courts have reached final decisions on both matters, there can be no federal takings claim.

The *Williamson County* rule requiring that these issues normally be addressed first through appropriate state proceedings does not in any way denigrate federal constitutional protections or result in their under-enforcement. Petitioner and certain amici point to cases in which lower courts have reached decisions that are arguably procedurally incorrect or unfair to takings plaintiffs. But any such problems arise from misapplications of *Williamson County*, not from its basic rule. There is no reason to overturn the rule itself.

Directing these claims to appropriate state court processes serves core state interests. It appropriately defers to States and their courts in the first instance to reach proper accommodations between individual property rights and core public interests—subject, of course, to the right of takings plaintiffs to seek review by this Court. It ensures full enforcement of state-law limitations that could invalidate or limit a regulation independent of a Fifth Amendment challenge. And it allows the State to determine, through administrative and judicial processes, whether the regulatory benefits at issue are worth paying for if a state court determines that the regulatory decision would effect a taking, or whether the State should modify or rescind the decision or regulation to limit the expenditure of scarce tax dollars.

ARGUMENT

I. THE *WILLIAMSON COUNTY* RULE IS SOUND

Petitioner raises a variety of challenges to *Williamson County*'s rule that property owners alleging that a state or local regulation effects a federal taking must first seek compensation through available state procedures. That rule, however, is fundamentally sound. It accurately reflects that, in many States, the elements of any constitutional takings claim will not be established until the state courts, which are the States' final decision makers on pertinent issues, have adjudicated the matter and decided whether just compensation is due. And it appropriately defers to the leading role of the States in striking the proper constitutional balance between individual property rights and state property and land-use rules—all of which are quintessentially matters of state law.

A. *Williamson County*

In *Williamson County*, a landowner sued a county planning commission in federal court, claiming that the application of various zoning requirements to its property amounted to a federal taking. 473 U.S. 172. This Court held that the suit was not appropriate for federal determination at that time, for two reasons.

First, the Court reasoned, "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186. The owners had not applied to a Board of Zoning

Appeals that could have exempted the project from certain requirements. *Id.* at 188. As a result, there was not yet any "final decision regarding how [the owner would] be allowed to develop its property," making it impossible to undertake the fact-specific inquiry whether a federal taking had occurred, such as the "economic impact of the challenged action and the extent to which it interfere[d] with reasonable investment-backed expectations." *Id.* at 190-91.

Second, the federal takings claim was "not yet ripe" because it was not clear whether the Fifth Amendment right would in fact be violated, or to what extent. The owner had not sought compensation through the state-court "procedures the State ha[d] provided for doing so." 473 U.S. at 194. The Fifth Amendment does not, the Court reiterated, "require that just compensation be paid in advance of, or contemporaneously with, [a] taking." *Id.* Instead, "all that is required is that 'a reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Id.* (quoting ***Reg'l Rail Reorganization Act Cases***, 419 U.S. 102, 124-25 (1974)). Just as "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the [federal] Tucker Act," *id.* at 195 (citing ***Ruckelshaus v. Monsanto Co.***, 467 U.S. 986, 1016-20 (1984)), so too "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation," *id.* Because the plaintiff had not availed itself of the available state-law procedure, its federal suit was "premature." *Id.* at 197, 200.

B. *Williamson County* Properly Reflects the Special Nature of Takings Claims

Petitioner portrays *Williamson County*'s requirement that a federal takings claimant first resort to available state compensation procedures as a striking and unjustified anomaly. *See, e.g.*, Pet. Br. 28 ("No other type of constitutional plaintiff faces such a stern barrier to federal court access."). But no other constitutional provision requires compensation as an element of the violation. The *Williamson County* rule properly reflects that state-court decision-making is necessarily antecedent to determining whether and to what extent there has been any federal constitutional violation at all and that the questions at issue concern core state interests.

1. State-court Proceedings Are Part of the State's Final Regulatory Decisions

Petitioner does not challenge the portion of *Williamson County* that requires federal plaintiffs to obtain, as a prerequisite to bringing suit in federal court, a "final decision," through available administrative appeals, on how a state or local authority will apply laws or regulations in a particular case. 473 U.S. at 190-91. She challenges only the other holding of *Williamson County*, requiring federal plaintiffs to give state *courts* a chance to consider regulatory actions that purportedly cause a taking, and to decide what compensation, if any, will be provided for those actions as a matter of state law. But under the processes that some States have instituted, review by a state court is just as necessary as a final administrative decision before a court can properly analyze whether the federal Takings Clause has been violated. State court review can resolve any potential violations under state law and, if necessary, determine just compensation, thereby satisfying federal constitutional requirements.

a. States, through their constitutions, statutes, and common law, have subjected themselves and their subordinate entities to a variety of restrictions on the exercise of regulatory power. The maintenance of these self-imposed restrictions is fundamental to each State's existence as a sovereign, self-governing entity. *See generally Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government ... a State defines itself as a sovereign."); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (recognizing each State's "interest in establishing its own form of government").

Each State decides the degree to which regulatory authority is delegated to or withheld from the state entities and local governments that "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them ... in [the State's] absolute discretion." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991) (quoting *Sailors v. Bd. of Ed. of Kent Cty.*, 387 U.S. 105, 108 (1967)).[2] The exercise of state regulatory power is further subject to substantive limitations under state law.[3] And the exercise of governmental power is conditioned on compliance with important procedural requirements to ensure that the people of each State "retain control over the instruments they have created."[4]

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[2] The United States contends that "the effect of the *Williamson County* rule is limited to claims against local governments." U.S. Br. 4 n.2. That is not correct. States are directly affected by *Williamson County* when they waive sovereign immunity as to just compensation claims or, as the United States acknowledges, when their officers are sued for Takings Clause violations under 42 U.S.C. § 1983. *Id.; cf. Downing/Salt Pond Partners, L.P. v. Rhode Island and Providence Plantations*, 642 F.3d 16 (1st. Cir. 2011). And, as this brief explains, *Williamson County* affects the

Collectively these requirements supersede any particular administrative body's decision, because if a regulation is invalid under state law then it may not be applied. *See, e.g., Morehart v. Cty. of Santa Barbara*, 7 Cal. 4th 725, 732 (1994) (county lacked power to impose certain conditions on issuance of development permit); *Sawyer Envtl. Recovery Facilities v. Town of Hampden*, 760 A.2d 257, 265-66 (Me. 2000) (state environmental statute preempts more stringent local ordinance); *Cohen v. Bd. of Appeals*, 100 N.Y.2d 395, 399 (2003) (statewide standard of area variance review controls locality); *Isla Verde Int'l Holdings v. City of Camas*, 49 P.3d 867, 878 (Wash. 2002) (city regulation requiring developer to set aside part of

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administration of state law and regulatory processes.

[3] *See, e.g.*, California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000-21189.57; California Subdivision Map Act, Cal. Gov't Code §§ 66410-66499.38; California Coastal Act, Cal. Pub. Res. Code §§ 30000-30900; Massachusetts Wetlands Regulations, 310 Mass. Code Regs. §§ 10.01-10.60; New York Tidal Wetlands Act, N.Y. Envtl. Conserv. Law §§ 25-0101–25-0601.

[4] Cal. Gov't Code § 54950 (legislative declaration regarding law on open meeting and public processes); *see, e.g., id.* §§ 11120-11132 (open meeting law); *id.* §§ 11340 et seq. (Administrative Procedure Act); Mass. Gen. Laws ch. 30A, §§ 1-25 (Administrative Procedure Act); N.Y. Em. Dom. Proc. Law §§ 201-206 (requiring notice and public hearings prior to condemnation).

parcel as open space invalidated under state law).[5] As a result, even where an administrative appeal has run its course, state court processes are integral to determining whether and how a regulatory action that could be challenged as a federal taking will in fact go into effect.

In California, for instance, where a property owner challenges development restrictions as a taking of property, the owner's inverse condemnation action must be joined with a petition for administrative mandamus (for as-applied challenges) or complaint for declaratory relief (for facial challenges). *Hensler v. City of Glendale*, 8 Cal. 4th 1, 14 (1994). That allows the judge to determine whether the "application of the ordinance or regulation to the property is statutorily permissible." *Id.* Where the regulatory action is unauthorized under state law, it must be set aside on those grounds. *See, e.g., Shaw v. Cty. of Santa Cruz*, 88 Cal. Rptr. 3d 186, 210, 221 (Ct. App. 2008) (noting trial court decision to set aside a permit denial that was unauthorized under state law); *see also Steinbergh v. Rent Control Bd. of Cambridge*, 546 N.E.2d.

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[5] In addition, many state and local laws are specifically crafted to avoid takings liability. *See, e.g.*, 310 Mass. Code Regs. § 10.05(10)(a)(3) (authorizing agency to waive the application of any state wetlands regulation where "it is necessary to avoid an Order that so restricts the use of property as to constitute an unconstitutional taking without compensation"); Cal. Pub. Res. Code § 30010; *see also Daddario v. Cape Cod Comm'n*, 681 N.E.2d 833, 836 (Mass. 1997) (applying regulation which provided that "the commission shall approve or approve with conditions a development of regional impact where an applicant demonstrates that to disapprove the development of regional impact would constitute a taking of property in violation of the Massachusetts and United States Constitutions").

169, 172 (Mass. 1989) (city ordinance exceeded authority granted in state law); *Premium Standard Farms v. Lincoln Twp.*, 946 S.W.2d 234, 240 (Mo. 1997) (setback and bonding requirements exceeded township's statutorily granted zoning powers).

In these and similar instances, there can be no clear basis for a federal takings claim unless and until it has been resolved as a matter of state law whether and how a state or local regulation or regulatory decision will finally apply to particular property.

b. Similarly, some States include state-court adjudication as part of the decision-making process that determines whether or not a regulation should continue to be applied given its effect on objecting property owners. This Court has recognized that a government entity held to have committed a regulatory taking is not obliged to maintain its initial position and pay for a permanent taking. Rather, "the government may elect to abandon its intrusion or discontinue regulations" and pay only for any temporary taking that occurred before that decision. *First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 317 (1987). Where the governmental body "acquiesce[s]" in this manner, a landowner "has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking." *Id.*

In some States, state-court adjudication is structured to provide a clear point in the process where the public entity may rescind or modify an action and pay only for any temporary taking. In California, for example, a multi-step process facilitates the sequential resolution of state-law issues and liability for any taking before a jury is convened to decide on a just amount of compensation. *Hensler*, 8 Cal. 4th at 14. If a judge rules that a regulatory action effects a taking, then the government has an opportunity to rescind its action or choose not to apply it. *See, e.g.*, *Avenida San Juan P'ship v. City of San Clemente*, 135 Cal. Rptr. 3d 570, 591 (Ct. App. 2011) (giving city a choice to invalidate its action or pay permanent-taking compensation). Under New York's Tidal Wetlands Act, when a property owner challenges a permit denial, the court first determines whether the agency decision is supported by substantial evidence and if so, whether it constitutes a taking requiring compensation. N.Y. Envtl. Conserv. Law § 25-0404. If the landowner prevails, "the Commissioner is directed, at his option, to either grant the requested permit or institute condemnation proceedings." *de St. Aubin v. Flacke*, 68 N.Y.2d 66, 70 (1986). State-court adjudication thus serves as an integral step in determining whether and for how long a regulation or decision will continue to govern the plaintiff's use of his or her property.

c. Finally, as *Williamson County* recognized, a public entity violates the Fifth Amendment when private property is both "taken for public use" and the public entity fails to pay "just compensation." U.S. Const., amend. V. The appropriate compensation may be determined through post-taking proceedings—particularly where either the existence of a taking or the amount of compensation due is subject to dispute. *See, e.g.*, *Williamson County*, 473 U.S. at 194-95; U.S. Br. 8-16.[6] Channeling takings claims (and particularly regulatory takings claims) to state courts thus allows state processes to resolve in the first instance whether the state action is lawful, whether compensation is required, and if so, whether to rescind the regulation and pay only for a temporary taking—and thus whether or not there is any basis for a federal takings claim to begin with.

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[6] Arguments that the Takings Clause at its inception required compensation to be simultaneous with any expropriation (*e.g.*, Washington Legal Foundation Br. 11-12) have no force when applied to regulatory takings, which were not envisioned when

Particularly where regulation, rather than physical expropriation, is at issue, agencies usually are not equipped to determine in advance whether a particular action would constitute a compensable taking under state and federal rules. *See Lingle v. Chevron USA Inc.*, 544 U.S. 528, 538, 539 (2005) (most regulatory takings are governed by the standards in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), each of which "has given rise to vexing subsidiary questions"); *cf.* U.S. Br. 16 (it would be "impossible to provide compensation in advance for all federal actions that might ultimately be found to be takings"). In any event, the property owner is normally entitled to judicial review of an agency determination on that issue. States have therefore entrusted their courts with the authority to undertake the factual and legal inquiries necessary to determine whether the government is obligated to pay property owners for any harm allegedly caused by regulatory

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the Fifth Amendment was enacted, and which normally are held to exist only after contested proceedings. *See Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property or the functional equivalent of a 'practical ouster of [the owner's] possession.'" (internal citations omitted)); *see also* Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 708 (1985).

action. The state courts are, in effect, the final decision makers, providing answers to questions without which a federal Takings Clause violation does not occur. And *Williamson County* properly recognizes that unless and until those final decision makers refuse to provide adequate compensation, there has been no federal "taking." *Williamson County*, 473 U.S. at 196-97.

2. Without a Completed State Adjudication, Many Federal Takings Claims Are Hypothetical or Contingent

Accordingly, at least in some States, it will not be "clear that the Government has both taken property *and* denied just compensation," *Horne v. Dep't of Agric.*, 569 U.S. 513, 525–526 (2013), until state courts have acted on a particular related set of claims. The state court's application of state law may clarify the scope of the compensable claim, and the state court's determination of whether and how long a regulation will remain in place is vital to determining whether a violation has occurred and the proper remedy for it.

These concerns explain why *Williamson County* properly described a federal lawsuit as "premature" before such state judicial determinations have been made. *See* 473 U.S. at 197, 200. The same principle underlies both that rule and the portion of *Williamson County* that petitioner does not challenge, holding that the federal case is unripe if there has been no final decision by "the government entity charged with implementing the regulations" regarding "the application of the regulations to the property at issue." *Williamson County*, 473 U.S. at 186.

A federal takings claim is not "fit for review," *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812

(2003), until the State has come to a "final, definitive position," through the processes established under state law, on how the State and its local governments will "apply the regulations at issue to the particular [property] in question," *Williamson County*, 473 U.S. at 191.[7] In fact, a state court's decision to invalidate a regulation or a decision applying the regulation on state-law grounds, or to require compensation on state-law grounds, may completely moot the federal issue, making it especially unwise to act prematurely. *See generally, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring); *cf. La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 32-33 (1959) (Brennan, J., dissenting) ("Numerous decisions ... have sanctioned abstention from deciding cases involving a federal constitutional issue where a state court determination of state law might moot the issue or put the case in a different posture.").

3. *Williamson County* Is Consistent with Other Principles of Federal Jurisdiction

Petitioner contends that *Williamson County*'s rule should be discarded because it "den[ies] a federal forum to property owners claiming a 'taking' of property," Pet. Br. 27. She argues that requiring initial state proceedings is inconsistent with her right to "a federal forum for federal civil rights claims under ... 42 U.S.C. § 1983." Pet. Br. 27. But certain types of claims involving federal constitutional rights have long been predominantly adjudicated in state courts.

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[7] Indeed, the question of "just compensation" is inherently tied to state law, and some States have takings clauses with both stricter public purpose requirements and more generous compensation. Whereas just compensation under the Fifth Amendment is generally measured by fair market value, *see Horne v. Dep't of Agric.*, ___ U.S. ___, 135 S.Ct. 2419, 2432 (2015), Louisiana, for example, compensates owners for the "full extent of the loss." La. Const. Art. I, §4(B)(5). This standard includes other damages caused by the expropriation, such as inconvenience, relocation expenses, and business losses. *See S. Lafourche Levee Dist. v. Jarreau*, 217 So.3d 298, 306 (La. 2017).

Cases involving domestic relations, parental rights, and probate law, for example, frequently implicate fundamental federal rights. *See, e.g., Lehr v. Robertson*, 463 U.S. 248 (1983) (equal protection and due process challenges in paternity proceedings); *Trimble v. Gordon*, 430 U.S. 762 (1977) (equal protection challenge to inheritance rule). Yet they are litigated almost exclusively in state court. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 694-695 (1992) (domestic relations cases); *Markham v. Allen*, 326 U.S. 490, 494 (1946) (probate).

Challenges to the enforcement of state tax laws may also involve claimed constitutional violations. *See, e.g., Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 107 (1981). This Court has reasoned, however, that the "ready access to federal courts" that is generally provided under 42 U.S.C. § 1983 does not give taxpayers an automatic right to have their constitutional claims adjudicated by federal courts in the first instance. *Id.* at 116. Instead, as *Fair Assessment* holds, state "taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete." *Id.* Without such a rule, the Court reasoned, federal courts would be turned into "'a source of appellate review of all state property tax classifications.'" *Id.* at 114 (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 478 F.Supp. 1231, 1234 (E.D.Mo. 1979)).

Similar concerns are present here. Federal courts should not be a routine forum for challenging zoning and land-use decisions. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) ("Our role is not and should not be to sit as a zoning board of appeals."). This makes sense, because complex questions about the application of state and local law to particular facts are inextricably intertwined with takings claims, and "[m]inimal respect for the state processes ... precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (emphasis omitted).

Nor is there anything about the Takings Clause in particular that makes immediate access to an Article III court indispensable. This Court's decision in *Williamson County* to channel most takings claims involving state or local governments to the state courts is consistent with the way the federal system treats similar claims against the federal government. Most plaintiffs who wish to pursue such claims must sue first in the Court of Federal Claims. *See* 28 U.S.C. § 1491(a)(1); *Williamson County*, 473 U.S. at 195. Only after that court decides whether and how much compensation will be paid may the claimant proceed to an Article III court, by appeal to the Federal Circuit. The Court of Federal Claims is not an Article III court, and its proceedings in Washington D.C. may be far less convenient for claimants than local state court proceedings under *Williamson County*.

C. *Williamson County* Is Not Unfair to Property Owners

Petitioner likewise argues that "[t]he central issue in this case is whether American property owners ...

are entitled to a realistic and fair opportunity to seek compensation for a 'taking' of property within the meaning of the Fifth Amendment." Pet. Br. 1. But neither ***Williamson County*** itself, nor the preclusive effects that can result from state-court adjudication, deprive property owners of a fair adjudication of their federal rights.

1. Many arguments against ***Williamson County*** seem ultimately premised on a general "distrust of the capacity of the state courts to render correct decisions on constitutional issues." ***Allen v. McCurry***, 449 U.S. 90, 104 (1980); *see, e.g.*, San Remo Hotel Br. 3-4, 9-10, 16-17. But state courts have a constitutional obligation to enforce federal law, and this Court's precedents reflect a "confidence in their ability to do so." ***Allen***, 449 U.S. at 104. Indeed, this is a "foundational principle of our federal system." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). Here, as in other contexts, the Court should be "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

In practice, state courts have carefully protected property owners' rights. That is evident from the many appellate decisions (not to mention trial court decisions) holding that a taking has occurred and ordering compensation.[8]

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[8] *See, e.g.*, *Lockaway Storage v. Cty. of Alameda*, 156 Cal. Rptr. 3d 607 (Ct. App. 2013) (authorizing the challenged development to proceed and awarding temporary takings damages of $990,000); *Noghrey v. Town of Brookhaven*, 938 N.Y.S. 2d 613 (App. Div. 2012) ($840,000 damages award where rezoning led to decline in property value); *Avenida San Juan P'ship*, 135 Cal.

Of course, property owners also often lose regulatory takings claims in state court. But that outcome properly reflects a combination of the state and local efforts to regulate in ways that do not effect a taking of property and the substantive standard that applies to such claims under federal law. In federal court, too, plaintiffs "rarely prevail in a *Penn Central* claim." Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 Fed. Circuit B.J. 677, 699 (2013); *see also* Meltz, *Takings Law Today: A Primer for the Perplexed,* 34 Ecology L.Q. 307, 333 (2007) ("The *Penn Central* test has rarely been invoked successfully in the Supreme Court, except where a special feature of the challenged regulation, such as physical invasion, total taking, or interference with a fundamental property interest, triggered categorical analysis."). The problem is not that plaintiffs are victims of state-court discrimination; it is that regulatory takings claims are difficult to establish in any forum.

2. Nor is there any anomaly or unfairness in the possibility that issues decided in state-court adjudication regarding takings claims may have preclusive effect in later federal proceedings. *See* Pet. Br. 24-26.

Rptr. 3d 570 (ordering compliance with writ invalidating spot zoning or payment of $1.3 million in takings damages); *see also Muskin v. State Dep't of Assessments*, 30 A.3d 962 (Md. Ct. App. 2011) (holding statute transferring unregistered ground leases was a taking and invalidating statute); *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75 (Ct. App. 2008) (holding city's moratorium on development was a taking and remanding for determination of just compensation); *Lopes v. City of Peabody*, 718 N.E. 2d 846 (Mass. 1999) (holding that property owner entitled to reimbursement of real estate taxes based on uncontested trial court finding of partial regulatory taking).

Issue preclusion is not automatic in takings cases. It applies under the same terms as other applications of the Full Faith and Credit Clause. If a state court decision does not meet the requirements that have been developed under that clause to protect litigants' rights, issue preclusion does not apply. *See e.g., Dodd v. Hood River Cty.*, 136 F.3d 1219, 1227-28 (9th Cir. 1998) (no preclusion where Oregon's substantive test for evaluating regulatory takings differed from the test under federal law).

In any event, there is nothing improper about applying issue preclusion to state-court decisions affecting constitutional issues. A plaintiff who wishes to press Fourth and Fifth Amendment claims relating to an arrest, search, or prosecution is generally barred from doing so in federal court while a state criminal case involving the same facts is imminent or pending. *See Younger v. Harris*, 401 U.S. 37 (1971). State-court decisions in such cases receive full preclusive effect in any later federal civil case, and may bar the later federal claim entirely. *See Allen*, 449 U.S. 90 (state trial court's decision that search was proper under Fourth Amendment precluded raising same claim under Section 1983). Similarly, a State may decide to waive its sovereign immunity to suit in state court but not federal court. *See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). Where that happens, an adverse decision on particular issues in state court would have preclusive effect in any later federal suit against other defendants. Preclusive effects are a consequence of having had a full and fair opportunity to litigate one's claims in any forum. They are not a special disadvantage imposed by state courts or by the *Williamson County* framework.

3. Finally, petitioner argues that *Williamson County* must be overruled because property owners might find themselves in the unfair position of being unable to proceed in either state or federal court—if, for example, a state case were removed to federal court and then dismissed under *Williamson County*. *See* Pet. 30-33. But any such problem would arise only from a misapplication of *Williamson County*. Petitioner points to no necessary unfairness that would justify overruling the decision's basic rule.

The *Williamson County* rule applies only where the state-court proceeding would provide a "reasonable, certain, and adequate judicial remedy." 473 U.S. at 194; *see Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997). Some state procedures may not meet this test. *See, e.g., First English*, 482 U.S. at 321 (state process for addressing regulatory takings inadequate where it provided no compensation for temporary regulatory takings). Where that is the case, a plaintiff need not resort to those procedures before proceeding to federal court. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 699 (1999) (noting decision allowing federal plaintiff to bypass procedures deemed inadequate in *First English*); *cf. Fair Assessment*, 454 U.S. at 116 n.8 (requirement that taxpayer claims be brought in state court if there is a "plain, adequate, and complete" remedy requires pursuing state-court remedies only if substantive federal rights "will not be thereby lost").

Federal courts have correctly recognized that a case should also remain in federal court under *Williamson County* if a state procedure which would otherwise be adequate is being applied unfairly or inefficiently in the particular case. *See, e.g., Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir.

2013); *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010).[9]

The amici States do not endorse any application of *Williamson County* under which a governmental defendant could first remove a case to federal court and then seek dismissal solely under *Williamson County*. *See* Pet. Br. 31; *cf. Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (state waives Eleventh Amendment immunity by voluntarily removing a case to federal court). As petitioner acknowledges (Br. 32), courts have frequently determined that a case which the defendant has thus removed may proceed in federal court without further state proceedings. *See, e.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545-547 (4th Cir. 2013); *Lilly Inv. v. City of Rochester*, 674 Fed. App'x 523, 530 (6th Cir. 2017).[10] If there are decisions allowing procedural maneuvering that has the practical effect of depriving litigants of any forum, that problem should be dealt with by disapproving those decisions, not by a wholesale abandonment of the legal and prudential considerations on which *Williamson County* is firmly based. These or similar questions are matters of how to apply *Williamson County* in a way that is sensible and fair. They reveal no problem with the basic rule itself.

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[9] *See also, e.g.*, *Robinson v. City of Baton Rouge*, No. 13-375-JWD-RLB, 2016 WL 6211276, at *31, *as amended*, 2016 WL 6460220 (M.D. La. Oct. 28, 2016) (manipulation waived *Williamson County's* state court litigation requirement); *Los Altos El Granada Investors v. City of Capitola*, No. 045138JFPVT, 2005 WL 1774247, at *7 (N.D. Cal. July 26, 2005) (declining to apply *Williamson County* where state court "had been given fair warning that the plaintiff was asserting a takings claim and a fair opportunity to provide just compensation," but declined to hear the claim).

[10] *See also, e.g.*, *River N. Prop., LLC v. City & County of Denver*, No. 13-cv-01410-CMA-CBS, 2014 WL 1247813, at *7 (D. Colo. Mar. 26, 2014); *Athanasiou v. Town of Westhampton*, 30 F. Supp. 3d 84, 89 (D. Mass. 2014); *Zanke-Jodway v. Capital Consultants, Inc.*, No. 306206, 2014 WL 1267262, at *6 (Mich. Ct. App. Mar. 27, 2014); *Petersen v. Riverton City*, No. 2:08-CV-664 SA, 2009 WL 564392, at *2 (D. Utah Mar. 5, 2009)

II. *WILLIAMSON COUNTY* SERVES CORE STATE INTERESTS

Petitioner nonetheless asks this Court to overrule *Williamson County* and permit all takings plaintiffs to proceed immediately to federal courts, regardless of the situation in which their claim arises or the degree to which it is dependent on state-law questions that have not yet been fairly presented to and adjudicated by the state courts. The Court should reject that request. In addition to all the normal reasons for respecting stare decisis, this case implicates important state interests that are well served by *Williamson County*'s rule. Directing takings claims to state courts that provide a reasonable, certain, and adequate means for seeking relief in the first instance serves sovereign interests in respecting the primacy of state processes in core areas of state law and policy and in promoting effective and balanced regulation.

A. *Williamson County* Respects State Primacy in Matters of State Property Law

Williamson County brings takings cases, in the first instance, to the courts that are best able to answer underlying questions of state property law, and that are best situated to resolve often complex and highly local conflicts where individual rights and the needs of the community may be in tension.

The existence and nature of an underlying property right is the first question that courts must decide to resolve a takings claim. *See M&J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (courts first "inquire into the nature of the land owner's estate to determine whether the use interest proscribed by the governmental action was part of the owner's title to begin with"). Although the Fifth Amendment right against an uncompensated taking is a matter of federal law, the underlying property interests are typically defined by state law. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 161 (1998). The governing rules are often complex or unique to the individual state. *See, e.g., Phillips Petroleum Co. v. Miss.*, 484 U.S. 469 (1988) (Mississippi public trust law); *Fox River Paper Co. v. R.R. Comm'n of Wis.*, 274 U.S. 651, 655 (1927) (riparian rights in navigable waters and the soil); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (Pennsylvania law on subterranean coal). Here, for instance, the petitioner's takings claim depends in part on longstanding and highly specialized state common law pertaining to cemeteries. *See* Cemetery Law Scholars Br. 23-26.

Williamson County ensures that such issues are addressed in the first instance by state courts with relevant experience and knowledge, subject to review by state appellate courts that (unlike their federal counterparts) have the ultimate power to "define and interpret state law." *Schlesinger v. Councilman*, 420 U.S. 738, 755 (1975). This both spares the federal courts from having to grapple in the first instance with often complex or technical state-law issues and results in more consistent and reliable decisions. *See Shively v. Bowlby*, 152 U.S. 1, 26 (1894) ("[g]reat caution ... is necessary in applying [property right] precedents in one state to cases arising in another"). While the appellate determination of an open state-law issue in state court is typically definitive, determination of the same issue in federal court might be only a "dubious and tentative forecast" of how the state courts would resolve the issue. *La. Power & Light*, 360 U.S. at 29.[11]

Williamson County also respects that, as this Court and other federal courts have acknowledged, state courts have a particular advantage in resolving other "complex ... legal questions related to zoning and land-use regulations." *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 347 (2005).[12] Land use planning is "an area of particularly local concern," *Chez Sez III Corp. v. Twp. of Union*, 945 F.2d 628, 633 (3d Cir. 1991), involving "important matters of state and local policy," *Meredith v. Talbot Cty*, 828 F.2d 228, 232 (4th Cir. 1987). In determining whether a taking has occurred, "courts must consider all reasonable expectations whatever their source." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). State courts are better positioned than federal courts to identify and assess "unique concerns," *id.*, for example, relating to particular land systems or areas, which might significantly affect the federal takings analysis of a particular regulation. In this area of the law, as in certain others, it is both efficient and proper for state courts to address such questions in the first instance. *See La. Power & Light,* 360 U.S. at 28 (federal court properly abstained from deciding challenge to eminent domain proceeding, in part because state courts are better situated to rule on issues that "turn on legislation with much local variation interpreted in local settings").

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[11] The Takings Clause does not require that state property law be "static," and does not prevent States from "enacting new regulatory initiatives in response to changing conditions." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

[12] *See, e.g., River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) ("Federal courts are not boards of zoning appeals."); *Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996) ("[l]and use planning is a sensitive area of social policy" and interpreting land use regulations turns on "the peculiar facts of each case in light of the many [applicable] local and state-wide land use laws" (internal quotation marks omitted)); *Hill v. City of El Paso*, 437 F.2d 352, 357 (5th Cir. 1971) (describing local zoning ordinances as "grass roots procedures" that "are outside the general supervisory power of federal courts").

Of course, state decisions on ultimate questions of federal takings law are always subject to review by this Court. *See, e.g., Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702 (2010). Indeed, the Court has previously recognized that "most of the cases in [its] takings jurisprudence, including nearly all of the cases [involving regulatory takings], came to [the Court] on writs of certiorari from state courts of last resort." *San Remo Hotel*, 545 U.S. at 347. That tradition reflects state courts' primacy in most matters of state property law and land-use regulation, and this Court's ability to respect that state role while providing authoritative guidance for the protection of federal constitutional rights.

B. State-court Litigation Ensures that State-law Limits on Regulatory Action Are Enforced, Facilitating Effective and Fiscally Responsible State Regulation

Finally, *Williamson County* protects each State's ability to prevent regulatory overreaching by its own agents or subdivisions, thereby facilitating state efforts to ensure effective, efficient, and fiscally responsible regulation.

First, *Williamson County* serves a core state interest in establishing state mechanisms for reviewing the activities of subordinate governmental entities to ensure their compliance with state law. State courts typically have the authority to invalidate improper regulations and the decisions that apply them on a variety of state-law grounds, rather than holding that a particular action amounts to a taking and requiring compensation. *See supra*, pp. 7-9. *Williamson County* ensures that States will have the practical ability to enforce such state-law limits on regulatory action. Proper state proceedings may make it unnecessary ever to reach federal takings issues, thus allowing the courts to avoid reaching the constitutional issue at all. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (a "longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them"). At a minimum, those state proceedings substantially clarify the actual contours of a federal takings claim. Indeed, as discussed above (*see supra*, p. 10), some States ensure that unnecessary federal constitutional adjudication will be avoided by requiring those seeking compensation to join available state-law claims that could invalidate or require modification of a regulatory action.

In contrast, plaintiffs in federal court would not necessarily be required to join meritorious state-law claims to a Fifth Amendment takings claim. And even where a violation of state law is pleaded and would provide a basis to invalidate or modify a regulatory action, federal judges could choose to decide federal constitutional claims first or to decline jurisdiction over the state-law claims entirely. *See* 28 U.S.C. § 1367(c); *cf. R.R. Comm'n v. Pullman Co.*, 312 U.S.

496, 499 (1941) ("as outsiders without special competence in Texas law," federal courts would leave issues regarding the state railroad commission's authority to the Texas courts).

Second, *Williamson County* supports fiscally responsible government. State procedures can be designed to allow state or local regulators clear opportunities to alter regulatory policies or actions if a state court concludes that they would otherwise require compensation under state law. *See supra*, pp. 11-12. Such procedures, which are most effectively managed within the boundaries of a State's own legal system, can help regulators appropriately balance the true costs and benefits of a regulation. Federal adjudication is not similarly structured to allow specifically for a state or local entity to rescind or modify an action between a finding of liability and an assessment of just compensation. To allow the governmental entity an opportunity to implement its right to rescind or alter an action if it is determined to effect a taking, the federal court might need to insert a lengthy pause between the liability and compensation phases of a single federal jury trial.[13] There is no reason to embark on the project of working out such potential complexities with respect to federal proceedings when state courts already provide an appropriate forum for managing these claims.

Finally, *Williamson County* allows States to consider state administrative law as well as takings challenges in a comprehensive and timely manner, providing the certainty that facilitates effective regulation and allows development to proceed. Land-use regulations consist of interrelated parts that interact with each other in complex ways.[14] They are designed to operate as an integrated whole. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994) (discussing Oregon's "comprehensive land use management program," including "regulations which are part of an integrated hierarchy of legally binding goals, plans, and regulations"). Where one aspect of such a regime is invalidated, or requires payment for a permanent taking, changes to other aspects may be in order. Efficiently coordinated resolution of such challenges is therefore necessary for effective regulation—and should also serve regulated parties, whose planning and financing benefits from as much certainty as can be provided. *See* Nat'l Assn. of Home Builders Br. 1 (noting dependence on "clear regulatory and legal processes").

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[13] *See generally City of Monterey*, 526 U.S. 687 (Seventh Amendment requires jury trial on liability and compensation for inverse condemnation claims in federal court).

Some States have reacted to this reality by designing systems to adjudicate challenges to such programs as quickly as possible. *See, e.g.*, Cal. Code Civ. Proc. § 65009 (requiring prompt presentation of suits seeking to void a legislative body's adoption of land-use plan or zoning ordinance); Cal. Gov't Code § 66020(d)(2) (action to void conditions placed on development project "shall take precedence over all other matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings"). Federal courts, which are removed from the day-to-day workings of state government, have different priorities, naturally designed to serve federal goals. *See* Fed. R. Civ. P. 40 ("The court must give priority to actions entitled to priority by a federal statute."). Channeling takings cases that arise from state regulation to state courts allows States to resolve such challenges as part of a comprehensive system for managing important issues of regulation, development, and private property rights that could not be more integral to the complex business of state and local governance.

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[14] *See, e.g.*, Cal. Gov't Code §§ 65590, 65590.1 (Mello Act requirement that demolition of low- and moderate-income housing be offset elsewhere in the same city or county); Cal. Pub. Res. Code §§ 30001.5, 30500-30526 (Coastal Act requirements for land use plans and implementing ordinances); *Pac. Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 55 Cal. 4th 783, 798 (2012) (applying Mello Act and Coastal Act together).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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No. 17-647

IN THE

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CATO INSTITUTE, NFIB SMALL BUSINESS LEGAL CENTER, SOUTHEASTERN LEGAL FOUNDATION, BEACON CENTER OF TENNESSEE, REASON FOUNDATION, AND PROFESSOR ILYA SOMIN AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Takings Clause state-litigation requirement established by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), should be abandoned as an unnecessary, unworkable anomaly in fundamental-rights jurisprudence.

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INTEREST OF THE *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The **National Federation of Independent Business Small Business Legal Center** (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that affect small businesses.

Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated for the protection of private property interests from unconstitutional takings.

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[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief. All parties lodged blanket consents with the Clerk. No counsel for any party authored any part of this brief; no person or entity other than *amici* made a monetary contribution intended to fund its preparation or submission.

The **Beacon Center of Tennessee** is a nonprofit organization based in Nashville that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports; Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

Ilya Somin is a Professor of Law at George Mason University. Professor Somin has written extensively about property and takings, and is the author of *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain*, and co-editor of *Eminent Domain: A Comparative Perspective.*

This case is of significant concern to *amici* because *Williamson County*'s unfounded and unworkable state litigation requirement relegates fundamental constitutional rights to second-class status and prevents property owners from invoking the Fifth Amendment's protection against uncompensated takings in federal courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Thirty years ago, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court pronounced a new and unfounded rule that a property owner must sue in state court to ripen a federal takings claim. This radical departure from historical practice has effectively shut property owners out of federal courts without any firm doctrinal justification.

Before *Williamson County*, there was no requirement that property owners must first resort to litigation to ripen their takings claims. And before the Fourteenth Amendment, judicial proceedings played no role in ripening takings claims. There is no basis for assuming that, through ratification, the Reconstruction Congress imposed any sort of litigation requirement on property owners seeking to ripen claims against state actors. Instead, only traditional ripeness requirements were contemplated.

The regime created by *Williamson County*'s aberrant state-litigation requirement effectively consigns Takings Clause claims to second-class status. No other individual constitutional rights claim is systematically excluded from federal court in the same way. By undermining vital access to federal courts, *Williamson County*'s state-litigation requirement is anathematic to the reforms that Congress sought to effect with the Reconstruction Amendments and enactment of U.S.C. § 1983. To curb pervasive abuse by state governments, the Fourteenth Amendment secured federal rights for all U.S. citizens. Access to federal courts is vital to uniform protection of constitutional rights, and Congress enacted § 1983 to ensure that citizens would have a federal forum to vindicate their federal rights—precisely because there was concern that state courts could not be trusted to adequately enforce the federal Constitution against the coordinate branches of state government.

Williamson County cannot be justified on the ground that takings claims are "premature" before state court proceedings have run their extensive course, as claimed in the decision. 473 U.S. at 195–97. Any other constitutional rights case initiated in federal court is "premature" in exactly the same way—because there is always the chance that the plaintiff could have obtained redress in state court instead.

It is also dangerous to justify this systematic exclusion from federal court by looking to the supposedly superior expertise of state judges on land-use issues. *See San Remo Hotel v. San Francisco*, 545 U.S. 323, 347 (2005). State judges could be said to have similar expertise on a variety of other issues that arise in constitutional litigation, including ones relevant to other rights protected by the Bill of Rights. After all, they understand local sensibilities, histories, and other particularities that might be just as relevant in the context of obscenity, reasonable expectations of privacy, and other cases.

Finally, while *stare decisis* is integral to stability and predictability in a legal system, it is not an "inexorable command." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). This Court need not continue down the wrong path once its flaws are revealed. Precedential weight is at its lowest in constitutional decisions, partly because mistakes here cannot be corrected except through constitutional amendment, which this Court has recognized is highly unlikely. By the Court's standards for when it is appropriate, even necessary, to reconsider precedent, *Williamson County*'s state-litigation requirement should be abandoned. It is poorly reasoned, unworkable, and has not fostered cognizable reliance interests.

Recognizing the indefensible nature of the anomalies created by *Williamson County*, four justices have already called for overruling the decision "in an appropriate case." *San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J., concurring). That appropriate case has now arrived.

ARGUMENT

I. THERE IS NO DOCTRINAL BASIS FOR *WILLIAMSON COUNTY*'S STATE-LITIGATION REQUIREMENT

Williamson County Regional Planning Commission v. Hamilton Bank pronounced special ripening rules that apply in review of a regulatory takings claim. 473 U.S. 172 (1985). These rules require more than the traditional cognizable injury to recognize a ripened constitutional claim

This requirement might make sense if the Court had meant that the landowner must first pursue *administrative procedures* for compensation. But instead, in a major break from historical practice, *Williamson County* proclaimed that to ripen a federal takings claim against a state actor, the owner must first be denied just compensation in state court. *Id.* at 194–97. This second ripening requirement was pronounced in dicta, as the Court had already concluded that Hamilton Bank's takings claim was unripe for want of a "final decision" before mentioning the supposed threshold requirement to litigate in state court. Nonetheless, the lower courts have applied *Williamson County's* state-litigation requirement as a near iron bar on access to federal courts over the past 33 years. *See, e.g., Arrigoni Enterprises, LLC v. Town of Durham, Conn.*, 136 S. Ct. 1409, 1412 (2016) (Thomas J., dissenting) (observing that many courts treat the state litigation rule as a jurisdictional bar).

The doors to the federal courts remain closed until the property owner receives an adverse decision in state court denying just compensation. While that decision—in theory—ripens the owner's takings claim, it simultaneously bars the owner from (re)litigating the issue in federal court. *Santini v. Conn. Hazardous Waste Management Service*, 342 F.3d 118, 130 (2nd Cir. 2003) (noting irony in that "the very procedure that [*Williamson County*] require[s] [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also preclude[s] [them] from ever bringing a Fifth Amendment takings claim."). *Williamson County's* state-litigation requirement results in a constitutional absurdity.

A. *Williamson County* Pronounced a New and Unfounded Ripeness Rule for Takings Claims

Until *Williamson County*, there was never a suggestion that courts played any role in consummating the constitutional violation in a takings case. Although the requirement to ripen a federal takings claim through state litigation is supposedly grounded in the text of the Fifth Amendment, this rule defies the most straightforward construction of the Takings Clause and contravenes historic precedent. Courts had long understood the Takings Clause as recognizing a fully justiciable claim once it had been alleged that: (a) private property had been "taken" pursuant to executive or legislative action, and; (b) without affording a contemporaneous administrative avenue for obtaining the compensation guaranteed by the Constitution.[2]

The courts played no role in ripening takings claims in the nineteenth century. For example, in *Cherokee Nation v. S. Kan. Ry. Co.*, a tribe sought compensation for land taken for construction of a railway, pursuant to an act of Congress. 135 U.S. 641 (1890). That claim was understood as properly raised because a Commission established by the executive branch determined that the Cherokee Nation was entitled to receive only a total of $7,352.94 (representing two separate awards)—a figure that the tribe maintained was insufficient to fully compensate for what had been taken. 135 U.S. at 667–68; *see also Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) (recognizing an immediately justiciable claim where private property was taken by an act of Congress through legislation limiting the amount of compensation that the executive branch was authorized to pay below fair market value).

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[2] *Williamson County* said that its state litigation requirement was "analogous" to this Court's conclusion, in *Parratt v. Taylor*, that there was no claim for violation of the Due Process Clause in a state's failure to provide a predeprivation process for review of "a random and unauthorized act by a state employee." 473 U.S. at 194 (citing *Parratt v. Taylor*, 451 U.S. 527 (1981)). *Parratt* held that "the Constitution does not require predeprivation process [under those circumstances] because it would be impossible or impracticable . . . [and, concluded] the Constitution is satisfied by the provision of meaningful postdeprivation process." *Id.* But *Parratt* is off-point. For one, the conclusion that an individual has an adequate opportunity "for determination of rights and liabilities" in a postdeprivation hearing does not necessarily dictate that their right to judicial review in a federal court is predicated upon a requirement to litigate that right in state court. 451 U.S at 541. Yet, even if that were the case, *Parratt* would be inapposite because the constitutional injury crystalizes in an inverse condemnation case with state action taking private property without affording an *administrative process* for securing just compensation. The availability of an avenue for judicial review in state court is simply beside the point where Congress has authorized lawsuits in federal court under U.S.C. § 1983.

Likewise, in *Causby v. United States*, this Court said that "[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine" because the claimant had suffered injury to his property rights without administrative compensation. 328 U.S. 256, 267 (1946);[3] *see also Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 176–77 (1871) (assuming a ripened controversy when interpreting Wisconsin's Takings Clause).

Similarly, ordinary justiciability rules applied for equivalent claims raised under the takings clauses of state constitutions. This is important because our federal takings jurisprudence was largely shaped during the 19th century by decisions drawing on state cases; most of the states had adopted analogous takings clauses—often with wording nearly identical to the text of the Fifth Amendment. *See id.* at 178–81 (taking guidance from Connecticut, Missouri, Massachusetts, Wisconsin, and other states); *Monongahela Navigation Co.*, 148 U.S. at 325, 327, 329 (looking to opinions construing analogous state claims); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1057–60 (1992) (Blackmun, J., dissenting) (referring to historic practice in the states). It is therefore highly relevant that state courts recognized actionable takings claims in challenges to legislative enactments purportedly authorizing appropriations in the absence of any statutorily defined administrative procedure for obtaining compensation. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60–61 (1999) (examining both antebellum and reconstruction era case law).

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[3] *Williamson County* cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019, 1016–20 (1984), for the proposition that a "takings claim[] against the Federal Government [is] premature until the property owner has availed itself of the process provided by the Tucker Act." 473 U.S. 194–95. But *Monsanto Co.* did not suggest that to ripen a claim for just compensation one must first litigate that claim in federal court, because that would make no sense. *Monsanto Co.* merely affirmed that Congress has designated a specific venue for bringing constitutional claims for uncompensated takings in the Court of Federal Claims. The fact that Congress has designated a specific forum for seeking compensation when the United States has taken property does not imply any limitation on the right to pursue a claim for just compensation in federal court *against state actors*.

For example, in *Callender v. Marsh*, Chief Justice Parker of the Massachusetts Supreme Judicial Court explained that a plaintiff may invoke the Commonwealth's takings clause "in an action for possession, or of trespass" against state agents, where the legislature has acted to occupy private property for public use "without means provided to indemnify the owner... because such a statute would be directly contrary the [Constitution.]" This was consistent with the approach courts took through the Civil War, wherein a claim was recognized as properly presented in court where an "owner[] complain[ed] of [a] government-sanctioned seizure of [] property" through a common law tort action. Brauneis, 52 Vand. L. Rev.

at 57. During this era, state-based takings clauses were invoked primarily in response to an affirmative defense–that is, when the defendant(s) argued that they had acted consistent with validly enacted law. *Id.* Therefore, the state-based takings clause was invoked as a countermeasure, with the plaintiff owner arguing "that the legislation on which defendants relied was void, because it purported to authorize acts that amounted to takings of private property, but did not provide for just compensation." *Id.*

In *Kennedy v. Indianapolis*, this Court recognized a justiciable "controversy" in a quiet title action in which a landowner claimed that he never received compensation for the taking of his land, as required under Indiana's Takings Clause. 103 U.S. 599, 601 (1880). The land was taken for construction of a canal and a commission concluded that no compensation was owed because of the economic benefits that would accrue to the owner's residuary parcel upon completion of the project. *Kennedy v. Indianapolis*, 14 F. Cas. 314, 315 (C.C.D. Ind. 1878) (observing that "the commissioners appointed reported that the benefits which he would receive from the construction of the canal equaled any damages that his property might sustain"). But those benefits never materialized because the project was abandoned. On those facts, Chief Justice Morrison Waite held that the state failed to pay just compensation for the property in question. *Kennedy*, 103 U.S. at 604–06. There was no suggestion that the owner should have pressed a claim for compensation in Indiana state court as a predicate for invoking the Takings Clause. It was understood that the constitutional issue was properly presented.

The remedy for a takings violation changed in many states during the late nineteenth century. Brauneis, 52 Vand. L. Rev. at 57. Under the "new framework for owner-initiated just compensation litigation" state courts recognized "that a right of action for just compensation was either implied or explicit in just compensation provisions themselves." *Id.* Such a claim was actionable in court at the time property was taken if the authorities failed to provide an administrative procedure for obtaining just compensation or if the compensation awarded by the executive authority was alleged to be insufficient to satisfy the constitutional demand. And this is precisely the approach that this Court endorsed in recognizing inverse condemnation claims wherein a state or federal government is alleged to have taken private property through legislative or executive action without providing an administrative means for acquiring compensation. *See Pumpelly*, 80 U.S. 166, at 176–77 (emphasizing that, because "it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands[,]" the "only question" was whether the plaintiff's property had been taken). The claim was understood as ripe at the moment alleged constitutional injury crystalized. *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 241 (1937) ("Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised."); *see also* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L. Rev. 153, 169 (1987) (observing that the ripeness inquiry often speaks to the substance of the underlying claim, and suggesting that *Williamson County's* ripeness determination was correct only to the extent that it properly characterized the constitutional injury).

B. There Is No Textual Basis for the State-Litigation Requirement

The state-litigation rule is illogical for other reasons as well. First, if the text of the Fifth Amendment really is to be understood as requiring individuals to seek compensation in court in order to ripen a takings claim, that requirement would seemingly apply equally to claims against both state and federal actors. Indeed, there is no basis for assuming a different standard for ripening takings claims against state or local entities than against the United States. The Fifth Amendment certainly imposes no requirement to pursue judicial remedies solely *against the states*. For that matter, the prohibition against uncompensated takings was originally directed only *against the federal government*. *See Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833).

And for the reasons discussed further in Section II, there is no cause to believe that the Fourteenth Amendment imposed any special ripening requirement. The incorporation doctrine does not change the procedural requirements for getting into federal court. If anything, incorporation should ease access because the entire point of incorporating the Fourteenth Amendment was to use the federal government—including federal courts—to protect those incorporated rights.[4] Therefore, any special ripening requirement would have to be derived from the actual text of the Fifth Amendment; but that would necessarily make the requirement equally applicable to claims against the United States. *Cf.* John D. Echeverria, Stop the Beach Renourishment: *Why the Judiciary is Different*, 35 Vt. L. Rev. 475, 489 (2010) ("If the judicial branch of state government is subject to the Takings Clause, which applies to the states via incorporation through the Fourteenth Amendment, then the judicial branch of the federal government must also be subject to the Takings Clause.").

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[4] The Bill of Rights' constitutional guarantees may be even more robust as applied to the states through the Fourteenth

Yet it would be nonsensical to say that to ripen a takings claim against the federal government, a property owner must litigate a claim for just compensation. Such a rule would be circular. It is simply wrong to infer that the Takings Clause entails a requirement to ripen takings claims in court. *See Monongahela Navigation Co.*, 148 U.S. 312 (emphasizing that the issue of whether just compensation was denied is a "judicial question.").

The constitutional text provides merely that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. And while there is ample room to dispute what sort of government conduct constitutes a "taking" and what precisely constitutes "just compensation" in a specific

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Amendment. *See* Kurt T. Lash, *Commentaries on Akhil Amar's* The Bill of Rights: Creation and Reconstruction, 33 U. Rich. L. Rev. 485, 489–98 (1999) (affirming that "the meaning of the Bill of Rights shifted from an expression of federalism to one of individual liberty" through adoption of the Fourteenth Amendment, and arguing that incorporated rights must be understood according to their public meaning in 1868); *see also*, James Ely, *The Guardian of Every Other Right*, 83–105 (3d Ed., 2008) (discussing takings law in the nineteenth century).

case, there is no basis for inferring procedural hurdles that were not originally understood to be included in the plain language of the text. Simply put, if a takings claim against the federal government ripens at the time compensation is denied by the executive and legislative branches, the same principle applies to takings claims against state or local governments. Accordingly, there is no basis for applying anything other than traditional ripeness requirements in U.S.C. § 1983 claims for just compensation.

II. THE RECONSTRUCTION CONGRESS AND FOURTEENTH AMENDMENT CONFERRED FEDERAL PROTECTIONS FOR PROPERTY RIGHTS—INCLUDING ACCESS TO FEDERAL COURTS—ON THE SAME TERMS AS OTHER FUNDAMENTAL RIGHTS

The Fourteenth Amendment prohibits state actions that deprive individuals of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. It would be strange if one of those three received less protection in federal court due to procedural hurdles. Individuals can straightforwardly vindicate their rights to life and liberty in federal court. The same must be true for property, which the Fourteenth Amendment protects on equal terms.

The Framers of the Fourteenth Amendment sought to apply the Bill of Rights against the states because of a long history of abusive practices by state governments, including state courts. *See generally*, Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998). Advocates feared that southern state governments threatened the property rights of African Americans and other political minorities, including whites who had supported the Union against the Confederacy during the Civil War. *Id.* at 268–69; *see also* Ilya Somin, *The Civil Rights Implications of Eminent Domain Abuse*, Testimony before the U.S. Comm'n on Civil Rights, 5–11 (Aug. 12, 2011), http://bit.ly/2jBpR10 (discussing the relevant history). As the Court has recognized, "[e]quality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil liberties which the Amendment was intended to guarantee." *Shelly v. Kraemer*, 334 U.S. 1, 10 (1948).

The Reconstruction Congress also enacted U.S.C. § 1983 to ensure that the federal courthouse doors would be open for any individual seeking vindication of federal rights. *See Briscoe v. Lahue*, 460 U.S. 325, 363–64 (1983) ("The debates over the 1871 Act are replete with hostile comments directed at state judicial systems.").

A. Access to Federal Courts Is Essential to Ensuring Uniform Protection of Property Against State Governments

One of the main purposes of "incorporating" the Bill of Rights against state governments was to ensure that residents of all states enjoy at least a minimum level of protection for their basic constitutional rights. And access to federal courts is essential to ensure a uniform national baseline of protection for constitutional rights, including those protected by the Takings Clause.

As Justice Story explained in the canonical case of *Martin v. Hunter's Lessee*, one of the most important reasons why the Court has ultimate jurisdiction over federal constitutional issues is "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." 14 U.S. (1 Wheat.) 304, 347–48 (1816) (Story, J.). The Court in *Martin* also emphasized the danger of undermining uniformity by giving free reign to possible state court bias in favor of their own state governments:

> The Constitution has presumed . . . that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice.

Id. at 347.

Potential bias by state courts in takings cases is more than just a theoretical problem, given the reality that many state judges are elected and have close ties to state parties and political leaders who adopt policies that result in regulatory takings. *See* Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pol'y 91, 99–100 (2011) (discussing this fact and its implications for takings jurisprudence). While conscientious judges will surely try to rule impartially, their political and institutional loyalties could easily influence their decisions, consciously or not. Moreover, state officials might deliberately seek judges more inclined to rebuff federal claims that threaten state government interests. *Id.* at 99. Such dangers make a federal forum for ensuring the protection of constitutional rights essential.

The right to private property was a central component of the "civil rights" that the Fourteenth

Amendment's framers sought to protect.[5] As Representative John Bingham, a leading framer of the Fourteenth Amendment, emphasized, the Takings Clause must be applied against the states in order to protect "citizens of the United States, whose property, by State legislation, has been wrested from them, under confiscation." Amar, *The Bill of Rights*, at 268. State governments are not entitled to special protection against takings claims. To the contrary, the protection of Takings Clause rights, and constitutional property rights generally against state governments, was a major motivating force behind adopting the Fourteenth Amendment in the first place.

But the Reconstruction Congress was not concerned only with the possibility of abuse at the hands of the legislative and executive branches of state government. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 507 (1982). There were also fears that abuses may be pervasive and systemic, infecting every branch of state government. Cf. *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713–14 (2010) (affirming that the Takings Clause applies on equal terms to all branches of state government). Indeed, there was special skepticism as to whether state courts could be trusted to vindicate federal rights against abuse—especially, but not exclusively, for African Americans recently freed from slavery. *See Mitchum v.*

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[5] On the centrality of property rights in 19th century conceptions of civil rights, *see, e.g.*, Harold Hyman & William Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-75*, 395–97 (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991) (describing how most 19th-century jurists viewed property as a fundamental right).

Foster, 407 U.S. 225, 242 (1972). Facing continued abuses in which state courts were complicit, the Reconstruction Congress thus enacted 42 U.S.C. § 1983 to ensure that the federal courthouse doors would be open for any individual seeking vindication of federal rights. *Id.* Against this historical backdrop, there is simply no reason to assume that Congress intended to exclude takings claimants from vindicating their federal rights in federal courts. *Cf. San Remo Hotel*, 545 U.S. at 349 (2005) (Rehnquist, C.J., concurring) (suggesting that owners should be allowed to initiate takings suits in federal court against state actors under Section 1983).

B. *Williamson County*'s State-Litigation Requirement Consigns Takings Claims to Second-Class Status Compared to Other Fundamental Rights

The Fourteenth Amendment and § 1983 conferred federal protections for property rights on the same terms as other fundamental rights. Yet no other constitutional right gets the same harsh treatment as the Takings Clause did in *Williamson County*. Plaintiffs alleging state violations of virtually any other constitutional right can go straight to federal court. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Second Amendment); *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (First Amendment); *Hudson v. McMillian*, 503 U.S. 1 (1992) (Eighth Amendment). The same rationale applies to rights protected by the Fourteenth Amendment, including unenumerated rights. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Bd. of Educ.*, 347 U.S. 54 (1954).

When it comes to the right to be free from uncompensated government takings, plaintiffs are turned away from the federal courthouse, forced instead to litigate in the courts of the very state that committed the violation. The result is an indefensible double standard. As the Court has emphasized, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The Court has suggested two justifications for its anomalous treatment of takings claims: that a plaintiff's claim that his property has been taken is "premature" before he has exhausted state compensation "procedures," *Williamson County*, 473 U.S. at 195–97, and that state courts have greater familiarity with takings issues than federal courts do. *See San Remo Hotel*, 545 U.S. at 347 ("[S]tate courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."). If applied to violations of other rights, these rationales would lead to the exclusion of numerous cases that federal courts routinely hear.

1. Federal courts' consideration of takings claims is no more "premature" than their consideration of other constitutional claims.

The logic of *Williamson* County—that a claim for an uncompensated taking is "premature" until an owner attempts to obtain compensation "through the procedures the state has provided for doing so"—could be used to justify denial of a federal venue for almost any other constitutional rights claim. 473 U.S. at 194.

Under *Williamson County's* reasoning, a claim that a state statute infringes on a plaintiff's First Amendment right to free speech could be "premature" until she has asked a state court to invalidate the statute that gave rise to the violation. Yet no one suggests that First Amendment plaintiffs must first attempt to litigate in state courts before any federal court can step in. For example, Andrew Cilek, who is currently waiting for a decision from this Court, challenged Minnesota's prohibition on wearing any political badge, button, or insignia in or around a polling place on First Amendment grounds without first "ripening" his federal constitutional claims in state court. *See Minn. Majority v. Mansky*, 849 F. 3d 749 (8th Cir. 2017).

This same holds true for other violations of constitutional rights. When Otis McDonald challenged Chicago's handgun ban and arcane registration requirements, he was not turned away from the federal courthouse on the ground that he first needed to go through the Illinois state courts to ensure that Chicago had no qualms about abridging the right of its residents to keep and bear arms. *See McDonald*, 561 U.S. 742. The constitutional injury giving rise to his claim was complete when attempts to lawfully register and possess a firearm were denied. Similarly, prisoners in California initiating suit in federal court alleging that overcrowding and lack of medical care in the state prison system violated their Eighth Amendment right to be free from cruel and unusual punishment were not required to first initiate proceedings in state court to define their injuries and ripen any federal constitutional claims. *See Brown v. Plata*, 563 U.S. 493 (2011).

Even if a state-court claim might potentially remedy the violation of federal rights, a violation giving rise to a federal cause of action has still occurred. That a state court might remedy a Takings Clause violation by providing compensation does not negate the fact that a violation has occurred. That violation is complete when the government takes the property without paying just compensation.

2. State courts have no greater expertise on takings claims than on numerous other constitutional claims that federal courts routinely hear.

The "expertise" rationale for *Williamson County's* rule fares no better. State judges may sometimes know more than federal judges about "complex factual, technical, and legal questions related to zoning and land-use regulations," but the same can be said of issues that arise in many cases involving other constitutional rights. *See* Ilya Somin, *Federalism and Property Rights*, 2011 U. Chi. Legal Forum 1, 28–31 (giving numerous examples). This possibility has never been sufficient to deny a plaintiff access to review of constitutional claims in federal court.

For example, some Establishment Clause claims require a determination of whether a "reasonable observer . . . aware of the history and context of the community and forum in which [the conduct occurred]" would view the practice as communicating a message of government endorsement or disapproval of religion. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring). State judges may have more detailed knowledge of their community's perceptions than federal judges, but that does not stop aggrieved parties from bringing Establishment Clause cases to federal court.[6]

This Court has also ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Whether any given speech is likely to incite "imminent lawless action" may well depend on variations in local conditions. Although state judges may be best informed about such conditions, free-speech claims are not consigned to state courts.

As Chief Justice Rehnquist noted in *San Remo Hotel*, "the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the Equal Protection Clause." 545 U.S. at 350–51 (Rehnquist, C.J., concurring).

Furthermore, there is no reason to assume that state judges necessarily have greater knowledge of Takings Clause and other property-rights issues than federal judges do. They may have greater knowledge of local conditions and regulations, while federal judges may have greater knowledge of relevant federal jurisprudence. Somin, *Stop the Beach Renourishment*, *supra*, at 102–03. Ultimately, this rationale does not provide a principled reason to prevent federal courts from hearing this single type of constitutional claim.

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[6] Of course, federal district judges also live in the communities where they preside—they don't exist in some federal ether—and, as leading citizens, may even better perceive local goings-on.

III. *STARE DECISIS* SHOULD NOT PREVENT THE COURT FROM OVERTURNING *WILLIAMSON COUNTY'S* STATE-LITIGATION REQUIREMENT

Like any complex issue, proper treatment of precedent requires balancing competing goals. Thomas R. Lee, *Stare Decisis in the Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 652 (1999). This Court's standards for overruling erroneous precedent require abandoning *Williamson County*'s state-litigation requirement.

Typically, "*stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). However, even as adhering to precedent increases judicial economy, preserves the legitimacy of the Court, and allows individuals to resolve their disputes outside of court based on settled expectations, blind adherence to precedent does violence to the same lofty ideals that purportedly undergird *stare decisis*. *See* Lee, *Stare Decisis*, at 652–54. As Justice Thurgood Marshall explained, *stare decisis* "contributes to the integrity of our constitutional system of government, both in appearance and in fact," by illustrating "that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986). But the legitimacy of the Court—and belief in the integrity of its decisions—is undermined when "an important constitutional decision with plainly inadequate rational support *must* be left in place for the sole reason that it once attracted five votes." *Payne*, 501 U.S. at 834 (Scalia, J., concurring). Stability is important, but so is "assuring accurate judicial decisions that faithfully apply correct principles of law." *Lee, Stare Decisis* at 654.

A. *Stare Decisis* Is at Its Lowest Ebb When Constitutional Rights Are At Stake, And Judges Have a Duty to Correct Constitutional Misinterpretations

Stare decisis "keep[s] the scale of justice even and steady." 1 Wm. Blackstone, Commentaries 69 (Univ. of Chicago Press 1979) (1765). But for all of its rich history, it is neither an "inexorable command" to be blindly followed, *Lawrence v. Texas*, 539 U.S. 558, 577 (2003), nor a "mechanical formula of adherence." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). This is especially true in constitutional cases. *Citizens United v. FEC*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). In contrast to common-law or statutory cases where "stability may trump perfect correctness" due to "the importance of preserving settled expectations," "in constitutional cases, the value of correct reasoning may trump stability given the difficulty of making changes to a constitutional precedent." Bryan A. Garner *et al.*, *The Law of Judicial Precedent* 352 (2016). Stated simply, "*stare decisis* does not require [this Court] to approve routine constitutional violations." *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

Eighty years ago, Justices Stone and Cardozo observed that "[t]he doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result). In contrast to cases involving statutory interpretation, this Court has acknowledged that its interest in adhering to *stare decisis* "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *see also*, *Patterson v. MacLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (The doctrine of *stare decisis* carries less weight "in constitutional cases" because "Congress lacks th[e] option [of changing a constitutional precedent by legislation], and an incorrect or outdated precedent may be overturned only by our own reconsideration or by constitutional amendment.").

Judges also have a duty to correct previous misinterpretations, particularly in constitutional cases. Historically, the common law consistently recognized as a core principle underlying *stare decisis* that "the function of a judge [is] not to make, but to declare the law." 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 51 (E. & R. Brooke 1797) (1642). Since judges did not make the law, judicial precedent, while important as an explanatory tool, was not to be followed if it conflicted with the substance of the law itself. *See Jones v. Randall*, 98 Eng. Rep. 706, 707 (1774) ("But precedent, though it be evidence of law, is not law in itself; much less the whole of law."). That understanding of how judges "make" law and apply *stare decisis* has been adopted and adapted to the modern realities of judging. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) (although "judges in a real sense 'make' law . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law is, rather than decreeing what it is today *changed* to, or what it will tomorrow be.").

This notion of the proper role of *stare decisis*—as a helpful guide but less than ironclad rule—is important because, as the Court has humbly acknowledged, "[a]ll judges make mistakes." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1896 (2016). Attempts by judges to discern the law may occasionally miss their mark. Accordingly, the Constitution itself—not prior judicial decisions—must be the conclusive source of constitutional law. This general approach to judicial decision-making, and a willingness to correct mistakes, was already at work in America before ratification of the Constitution. As the Pennsylvania Supreme Court said in 1786:

> A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law. Acting otherwise would have this consequence; because one man has been wronged by a judicial determination, therefore every man, having a like cause, ought to be wronged also.

Kerlin's Lessee v. Bull, 1 U.S. (1 Dall.) 175, 178 (1786).

While it would be unwise for any court to decide *every* legal issue anew, when past errors reach the very core of our constitutional system, it is incumbent upon the Court to correct course. As Blackstone wrote, "if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law." 1 Commentaries 69–70. Accordingly, "when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, [this Court] must be more willing to depart from that precedent." *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring).

B. The Considerations the Court Weighs in Deciding Whether to Overrule Precedent Support Overturning *Williamson County*'s State-Litigation Requirement

The Court has stated that it will "overrule an erroneously decided precedent . . . if: (1) its foundations have been ero[ded] by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning" it. *Lawrence*, 539 U.S. at 587–88. An additional factor that the Court considers is whether the original decision was "well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009). All four of these factors weigh in favor of overruling *Williamson County*'s state-litigation requirement.

The rule's "foundations have been eroded" by subsequent decisions, as it is at odds with the way the Court has treated other rights protected by the Bill of Rights. It is routine for federal courts to hear claims of constitutional rights violations without requiring the claims be litigated in state court, and without creating a Catch-22 situation under which the actions required to ripen a claim for federal court simultaneously make it impossible to bring one. *See San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) ("*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee"). Even challenges to state and local land-use regulations based on provisions of the Bill of Rights other than the Takings Clause can proceed in federal court without first running the gauntlet of state litigation. *See, e.g., Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (First Amendment challenge to restrictions on locations of adult businesses).

There is no doubt that *Williamson County* has been subjected to "substantial and ongoing criticism." In a concurring opinion in *San Remo Hotel*, four justices, including two currently sitting, noted that *Williamson County* has severe flaws, is inconsistent with the Court's treatment of other constitutional rights, and "has created some real anomalies, justifying our revisiting the issue." 545 U.S. at 349 (Rehnquist, C.J., concurring). *Williamson County* has also been severely criticized by scholars and legal commentators.[7]

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[7] See, e.g., R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under* Williamson County *has Yet to be Made*, 67 Baylor L. Rev. 567 (2015); Joshua D. Hawley, *The Beginning of the End?* Horne v. Department of Agriculture *and the Future of* Williamson County, 2012–2013 Cato Sup. Ct. Rev. 245; J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule*, 18 J. Land Use & Envtl. L. 209 (2003); Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Regional Planning Board v. Hamilton Bank, in *Taking Sides on Takings*

Williamson County has not induced "individual or societal reliance that counsels against overturning it." If an uncompensated restriction on property rights is constitutionally valid, the government should be able to defend it in federal court. Constitutionally valid policies do not require the protection of the *Williamson County* doctrine, and such protection is not extended against any other types of constitutional claims. By contrast, *Williamson County's* state-litigation requirement undermines the reliance interests of property owners who reasonably assume that they will have an opportunity to protect themselves against uncompensated takings in federal court. Instead, they are deprived of the ability to vindicate their rights by *Williamson County's* Kafkaesque rules.

Finally, *Williamson County*—a gross anomaly in our constitutional system—is an almost paradigmatic example of a decision that is not "well reasoned." What, other than unworkable and poorly reasoned, would a system that denies property owners with federal claims access to federal courts be called? First, owners are turned away and sent to state court to ripen their claims; then, when they return, the doors to the federal courthouse are closed because their constitutional claims have already been decided by the state. *Williamson County* fails to "explain why federal takings claims in particular should be singled out to be confined to state court." *San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring). The chief justice

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Issues: The Public & Private Perspective 471, 473–74 (Thomas E. Roberts, ed. 2002); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Pol'y 99, 102 (2000).

was right, and the Court should feel no qualms in overturning the state-litigation requirement.

CONCLUSION

The ability to vindicate federally secured rights is held sacrosanct in all other contexts. Yet, without any real explanation, *Williamson County* has relegated the right to receive "just compensation" for the taking of one's property to the status of an unprotected right—despite its explicit protection in constitutional text. The Court should reverse the decision below and finally overturn *Williamson County's* unfounded and unworkable state-litigation requirement.

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June 5, 2018

No. 17-647

In The
Supreme Court of the United States

◆

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, ET AL.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit**

◆

BRIEF OF CEMETERY LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF CEMETERY LAW SCHOLARS AS *AMICI CURIAE*

The undersigned cemetery law scholars respectfully submit this brief as *amici curiae*.[1]

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INTEREST OF *AMICI CURIAE*

In this case, this Court is asked to opine on certain procedures for properly raising a takings claim in federal court. Although the Court's focus is on *Williamson County Regional Comm'n v. Hamilton Bank*,[2] the underlying dispute concerns an ordinance that purports to recognize burial grounds and permit the public certain rights to access them. *Amici* have no personal stake in the outcome of this case; they are legal scholars whose research, writing, and teaching has focused on cemetery law. *Amici* submit this brief because they recognize that an understanding of the unique common law real property doctrines that apply to burial grounds may be useful to the Court in this matter.

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), all appropriate parties have filed letters granting blanket consent to the filing of *amicus curiae* briefs.

[2] 473 U.S. 172 (1985).

Joining in this brief as *amici* are:

Tanya D. Marsh is a Professor of Law at Wake Forest University School of Law in Winston-Salem, North Carolina. Professor Marsh is the author of the first treatise on the law of the dead published since 1950, *The Law of Human Remains* (2015) and the co-author, with her former student Daniel Gibson, of *Cemetery Law: The Common Law of Burying Grounds in the United States* (2015). Professor Marsh has written several law review articles on relevant topics, including *When Dirt and Death Collide: Legal and Property Interests in Burial Places*,[3] which explains the structure of common law legal and property interests in burial places in the United States. Professor Marsh also teaches the only course in Funeral and Cemetery Law in a United States law school.

Ryan M. Seidemann is the Chief of the Lands & Natural Resources Section, Office of the Attorney General, Louisiana Department of Justice. Mr. Seidemann is a Registered Professional Archaeologist and a lawyer whose practice representing the Louisiana Cemetery Board and the Louisiana State Archaeologist focuses on cemetery and archaeological law. Mr. Seidemann is an adjunct professor of law at Southern University Law Center in Baton Rouge, Louisiana, where he teaches, among other things, property law. During his career, Mr. Seidemann has authored more than 80 publications on cemetery law, property law, environmental and natural resources law, and anthropology, the most recent of which appeared in the ***William & Mary Environmental Law and Policy Review*** and focused on the ancient nature of cemetery site protection laws in the United States.[4]

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[3] Prob. & Prop., March/April 2016.

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SUMMARY OF ARGUMENT

In 2012, Scott Township, Lackawanna County, Pennsylvania ("the Township") adopted Ordinance 12-12-20-001 which, among other things, grants the public the right to access cemeteries located on private land in the Township during daylight hours.[5] Ms. Knick's Petition for Writ of Certiorari characterizes the Ordinance as "a burden that abridges her fundamental right to exclude others and which violates this Court's physical takings precedent."[6] Ms. Knick emphasizes that when she purchased the land in 1970, her title did not reflect the presence of a burial ground on the property, that "there is no official state registration of a cemetery," and "she was not aware of any physical sign of a burial ground."[7] The Third Circuit seemed sympathetic to Ms. Knick's concerns about the Ordinance, stating that the Ordinance is "extraordinary" and "constitutionally suspect."[8]

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[4] Ryan M. Seidemann, *Requiescat In Pace: The Cemetery Dedication and Its Implications for Land Use In Louisiana and Beyond*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 895 (2018).

[5] Ordinance 12-12-20-001 § 5 (Dec. 20, 2012).

[6] Petition for Writ of Certiorari at page 4.

[7] *Id.* at 6.

At the heart of the dispute between Ms. Knick and the Township is the question of whether the Ordinance constitutes a taking. Neither of the parties focused on this issue in their respective briefs to either the District Court or the Third Circuit, instead focusing on the procedural issues. Indeed, there is no precedent for Ms. Knick's claim that a taking has occurred because longstanding common law doctrines provide that landowners do *not* have the right to exclude all others from burial grounds located on private land.[9] Regardless of the language in the deed granting title to Ms. Knick, regardless of any "registration," and regardless of any physical signs of a burial ground, it is a well-established principle of common law that once human remains are intentionally placed in real property, such real property and all subsequent owners are burdened by encumbrances in favor of the dead, the kin of the dead, and the public.[10] The Ordinance is hardly "extraordinary"—most of the provisions contained therein simply restate rights already reserved at common law. Whether the Ordinance extends beyond the common law as adopted in the Commonwealth of Pennsylvania is more appropriately resolved in state court.[11]

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[8] ***Knick v. Twp. of Scott***, 862 F.3d 310, 314 (3d Cir. 2017), *cert. granted in part sub nom.* ***Knick v. Twp. of Scott, Pa.***, 138 S. Ct. 1262, 200 L. Ed. 2d 416 (2018).

[9] ***Stockton v. Weber***, 33 P. 332 (Cal. 1893) ("A single burial will entitle the interred cadaver to protection, and land containing a human being will be maintained inviolate.").

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[10] *Concordia Cemetery Ass'n v. Minnesota, etc., Ry.*, 12 N.E. 536 (Ill. 1887) ("What creates the cemetery is the act of setting the ground apart for the burial of the dead, marking it, and distinguishing it from the adjoining ground as a place of burial."); *Vidrine v. Vidrine*, 225 So.2d 691, 697 (La. App. 3d Cir. 1969), *writ refused*, 227 So.2d 594 (La. 1969) ("This dedication is in the nature of an irrevocable covenant running with the land. It is a real right, not a servitude or usufruct, but an implied contractual relationship that binds the owner irrevocably. . . . The owner is bound to the following: (1) He cannot remove or disturb any grave. (2) Relatives and friends have unrestricted rights to visit and care for the graves. (3) Property included in the cemetery cannot be used by the owner for any purpose inconsistent with cemetery purposes. (4) The owner cannot reduce the size of the lands set apart as a cemetery."); *Bitney v. Grim*, 144 P. 490, 491 (Or. 1914) ("Having been thus dedicated by the owner of the fee, the premises are subject to that use so long as bodies remain buried there and until they are removed by public authority or by friends or relatives. . . . But until its depopulation as a city of the dead is complete by one or the other process, the ground dedicated for the last resting place of deceased persons must remain true to its dedication. Although the tract in dispute has been grossly neglected, yet we think the testimony clearly establishes that it yet remains a cemetery and must be respected as such.").

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ARGUMENT

I. Real property that contains human remains is subject to unique common law doctrines that limit the rights of the fee owner to exclude others.

The common law of real property contains unique doctrines that apply only to real property containing human remains.[12] The idea that burial grounds are a unique subclass of real property is a concept that can be traced through the common law to English ecclesiastical law, Catholic canon law, and finally to the law of Ancient Rome.[13] When human remains are intentionally placed in real property with the consent of the owner, the common law recognizes that the character of such real property has been fundamentally and perpetually transformed.[14] The common law of burial places has a rich history, but it has long been neglected by legal scholars.[15]

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[11] *See, e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.").

[12] *See, e.g.*, Tanya D. Marsh, *When Dirt and Death Collide Legal and Property Interests in Burial Places*, Prob. & Prop., March/April 2016. Similar doctrines apply at civil law. *See* Ryan M. Seidemann, *Requiescat In Pace: The Cemetery Dedication and*

There are two major sources of the law of burial places in the United States: the common law, which varies from state to state, and state statutory law. Until the late 19th century, the law of burial places was almost exclusively common law. In the 19th and 20th centuries, the establishment of large, secular, privately

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Its Implications for Land Use In Louisiana and Beyond, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 895 (2018).

[13] Tanya D. Marsh and Daniel Gibson, Cemetery Law: The Common Law of Burying Grounds in the United States (2015). *See also* Seidemann, *Requiescat In Pace* (reviewing the development of the uniqueness of cemetery property law in the civil law traditions).

[14] Percival Jackson, The Law of Cadavers and of Burial and Burial Places 248 (2nd ed. 1950) ("We emphasize a basic principle of the law of burial that, whatever may be the mode of acquisition, and whatever the title acquired, once land has been devoted to burial it no longer is subject to mere rules of property law.").

[15] Prior to the publication in 2015 of The Law of Human Remains and Cemetery Law: The Common Law of Burying Grounds in the United States, the most recent treatise on cemetery law in the United States was Percival Jackson's The Law of Cadavers and of Burial and Burial Places (2nd ed. 1950).

owned burial grounds owned by for-profit and nonprofit entities and open to the general public prompted most states to enact statutory regimes to govern the creation, management, and perpetual care of this class of burial grounds.[16]

But on a numerical basis, the vast majority of burial places in the United States were established informally.[17] They were not legally separated from a larger parcel of land, and burial rights were granted by the landowner to family and neighbors. These private burial grounds, like the one that is purportedly on Ms. Knick's property, are tucked into the corners of fields across the United States.[18] For example, in North

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[16] Marsh, *When Dirt and Death Collide*, supra n. 3 at 59. *See, e.g.*, George Wharton Pepper and William Draper Lewis, A DIGEST OF THE LAWS OF PENNSYLVANIA FROM 1700 TO 1894, VOLUME I 513-16 (1896) (The Commonwealth of Pennsylvania adopted statutes regulating "cemetery companies" beginning in 1874.).

[17] *See* Jackson, THE LAW OF CADAVERS 216 ("The common cemetery in England was the parish graveyard in which every parishioner, without specified fault, was entitled to burial. The same was generally true in the United States in colonial times. But as the pioneer ventured westward and settled apart from neighboring habitations, he was frequently compelled to forego burial in the sacred ground of the place of common worship and to bury his dead in a secluded corner of his woodland lot. When proximity of neighboring settlers made a common burial ground possible, burials would often be made in a secular community graveyard.").

[18] David Charles Sloane, THE LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY 14-15 (1991) ("The lonely grave was soon replaced by clusters of graves as the pioneers' homesteads grew into small settlements. . . . Set among the trees on the outskirts of one of the fields, the domestic graveyard usually

Carolina, there are more than 30,000 informally recognized burial places,[19] but less than 200 cemeteries are "registered" with the state and regulated pursuant to the North Carolina Cemetery Act.[20] In Lackawanna County, Pennsylvania, the popular genealogy website *Find A Grave* lists 263 cemeteries, including a large number of small, primarily family cemeteries located on what is described on the site as a larger parcel of private property.[21]

Threats to burial grounds located on private land are, unfortunately, common.[22] Although various state

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occupied a high point on the land. Whether open for pasturing or enclosed by a stone wall, the graves were shaded by the trees ringing the field. Markers were placed irregularly around the small enclosure, with an occasional child's grave disturbing the line of the row because of the smaller size of the grave. The farmer periodically cut away the overgrown grass, and his wife tended any flowers inside the wall. . . . Domestic burial grounds were prevalent in all of the colonies. . . .").

[19] Cristine R. Dixon, *Deserting God's Acre: The Problem of Abandoned Cemeteries in North Carolina*, 6 WAKE FOREST J. L. & POL'Y S.S. 2 (2015).

[20] N.C. Gen. Stat. § 65-46 *et seq.* http://nccemetery.org/north-carolina-cemeteries/.

[21] https://www.findagrave.com/cemetery/search?locationId=county_2275.

[22] *See, e.g.*, Ed Donga, *6 Things to Know About the Cemetery Vandalism in West Bridgewater*, WICKED LOCAL (Mar. 15, 2016), http://bridgewaterwest.wickedlocal.com/article/20160315/NEWS/160316892 (last accessed Jul. 11, 2018) (discussing cemetery vandalism in Massachusetts); Shirley Ruhe, *Church and Preservationists Clash over Graveyard: Preserving cemetery would affect expansion plans*, ARLINGTON CONNECTION (Nov. 2, 2016), http://www.connectionnewspapers.com/news/2016/nov/02/church-and-preservationists-clash-over-graveyard/ (last accessed Jul. 11, 2018)

and federal laws have been enacted since the mid-1960s in an effort to protect graves from desecration,[23] burial grounds located on private land remain uniquely vulnerable.[24]

Dr. David Charles Sloane, who has written extensively about the history of the cemetery in the United States, has observed that these sacred spaces—especially those with no permanent grave marker—are at risk by their very nature:

(discussing troubles of development and cemeteries interacting in Virginia); John Ruch, *Grocery-anchored Sandy Springs project could replace apartments, displace historic cemetery*, Reporter Newspapers (Apr. 19, 2018), https://www.reporternewspapers.net/2018/04/19/grocery-anchored-sandy-springs-project-could-replace-apartments-displace-historic-cemetery/ (last accessed Jul. 11, 2018) (discussing potential impacts to historic Georgia cemetery resulting from development); Miya Shay, *Historic cemetery found on construction site of Fort Bend ISD's future technology center*, KTRK News (Apr. 11, 2018) http://abc13.com/society/historic-cemetery-found-on-ft-bend-isd-work-site/3329602/ (last accessed Jul. 11, 2018) (discussing complexities of cemetery/development interactions in Texas and elsewhere); Zack Hale, *Cemetery commissioners hope historic recognition reroutes gas pipeline*, The Daily News (Mar. 22, 2018) https://tdn.com/news/local/cemetery-commissioners-hope-historic-recognition-reroutes-gas-pipeline/article_960e84e8-2ee2-5183-894f-ff131d000b7e.html (last accessed Jul. 11, 2018) (discussing interactions of development and cemeteries in Washington).

[23] *E.g.*, the National Historic Preservation Act of 1966, 54 U.S.C. § 300101 *et seq.*; the National Environmental Policy Act of 1970, 16 U.S.C. § 4321 *et seq.*; the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.*

[24] *See generally* Ryan M. Seidemann, *NAGPRA at 20: What Have the States Done to Expand Human Remains Protections?*, 33(2) Museum Anthropology 199 (2010) (discussing the limited reach of federal human remains and cemetery protection laws).

> Until relatively recently, most Americans did not have permanent gravestones. They were too expensive. And of those that were erected, many have been lost over the centuries as the graveyard got in the way of progress or through the physical deterioration of memorials made of wood and fragile stones.
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> * * *
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> The number of unmarked graves throughout history must reach into the millions. The financial ability to have a gravestone, and to have that gravestone survive wars, urban development, weather, even theft shrinks that number much further. . . . Chinese workers on the rail lines of the West, slaves throughout the Americas, seamen of all ethnicities, and many other primarily poor and minority peoples have had their graves built over, disturbed, unacknowledged, even purposefully destroyed.[25]

These burial grounds are protected in most states by statutes that criminalize unauthorized disinterment and grave desecration,[26] but their most significant protection comes from the common law doctrines that grant rights to the deceased and to the living and the courts to protect them.

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[25] David Charles Sloane, IS THE CEMETERY DEAD?, 165-166, 216 (2018).

[26] *See, e.g.*, 18 Pa. Stat. and Cons. Stat. Ann. § 5509(a) (West) ("A person commits a misdemeanor of the second degree if he: (1) intentionally desecrates any public monument or structure, or place of worship or burial. . . ."); 18 Pa. Stat. and Cons. Stat. Ann. § 5509(a.1) (West) ("A person commits a misdemeanor of the first degree if the person intentionally desecrates a historic burial lot or historic burial place."). *See also* La. Rev. Stat. 14:101 (Louisiana's criminal desecration statute).

The common law provides that the "the dead . . . have rights, which are committed to the living to protect,"[27] most significantly, the right to an undisturbed repose in perpetuity. This right manifests itself in a common law which disfavors disinterment (*i.e.*, removal of human remains from a grave).[28]

In a 1926 disinterment case where a widow sought the court's permission to move her husband's remains from one cemetery to another, Justice Cardozo, then a member of the New York Court of Appeals, explained the general position of the common law on disinterment—"The dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose."[29] The leading case on disinterment in the United States is *Pettigrew v. Pettigrew*,[30] which was decided by the Supreme Court of Pennsylvania in 1904:

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[27] *Thompson v. Hickey*, 8 Abb. N. Cas. 159, 166 (N.Y. Sup. Ct. 1880) (holding that it is "an offense against good morals to mortgage a small isolated plot of ground in a cemetery, dedicated exclusively, under the sanctions of the law, as a sanctuary for the dead of one's family, and already consecrated by the ashes of one's kindred, I am sure cannot be well questioned. Such a transaction is clearly a breach of the policy of the statute, is contrary to its equity, and is within the evils it was designed to cure, and our moral nature protests against it.").

[28] *Brewer v. Am. Med. Alert Group*, 2010 WL 280986, *2 (M.D. Tenn. 2010) ("it is well settled that 'the quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is sanctioned.'"). *See also Afalonis v. Afalonis*, 90 A.D. 3d 917 (N.Y. App. Div. 2011) (same); *Rinnier v. Gracelawn Mem'l Park Inc.*, 2015 WL 7568363 (Del. Ch. 2015) (same); *Manson v. Manson*, 31 N.Y.S.3d 922 (N.Y. Sup. Ct. 2015) (same).

> The presumption is against a change. The imprecation on the tomb at Stratford, "Curst be he that moves my bones," whether it be Shakespeare's own or some reverent friend's, expresses the universal sentiment of humanity, not only against profanation, but even disturbance. When a case comes into court, the chancellor will regard this sentiment, and consider all the circumstances in that connection.[31]

The common law of the United States is of course derived from the common law of England as it existed at the end of the eighteenth century. At that time, England had an established church and the vast majority of those who died in that country were buried, pursuant to English ecclesiastical law, in the local churchyard. The states chose not to adopt English ecclesiastical law, which created a problem for early U.S. courts—in the absence of an established church that owned and had jurisdiction over the churchyards, which institution would protect the right of the dead to an undisturbed repose? In 1829, this Court provided the first answer—the courts of equity—in *Beatty v. Kurtz*.[32]

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[29] *Yome v. Gorman*, 152 N.E. 126, 129 (N.Y. 1926).

[30] 56 A. 878 (Pa. 1904).

[31] 56 A. at 880.

In 1856, the common law expanded to provide a second guardian of the rights of the dead—the living. In an eminent domain case in New York City, the court adopted a referee's report by Samuel B. Ruggles that established first, that "the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect," and second, that "such a right, in the absence of any testamentary disposition, belongs exclusively to the next of kin."[33] The so-called "Ruggles Report" was highly influential and the common law doctrines it established were adopted widely by state courts.[34] This right to "preserve the remains" of the dead is a foundation of the common law right to access graves.[35]

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[32] 27 U.S. 566 (1829).

[33] Samuel B. Ruggles, AN EXAMINATION OF THE LAW OF BURIAL, IN A REPORT TO THE SUPREME COURT OF NEW YORK IN THE MATTER OF TAKING A PORTION OF THE CEMETERY OF THE BRICK PRESBYTERIAN CHURCH, IN WIDENING BEEKMAN STREET, IN THE CITY OF NEW YORK 58 (1856).

[34] *See, e.g.*, *Wynkoop v. Wynkoop*, 42 Pa. 293, 301 (1861); *Pettigrew v. Pettigrew*, 56 A. 878 (Pa. 1904); *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227, 233 (1872); *Bogert v. City of Indianapolis*, 13 Ind. 134, 135 (1859); *Larson v. Chase*, 50 N.W. 238, 238 (Minn. 1891); *Johnston v. Marinus*, 1886 WL 6074 (N.Y. Sup. Ct. 1886).

[35] *See* Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 B.Y.U. L. REV. 1469, 1497 (2006).

II. When Ms. Knick acquired her real property, it was subject to the common law protections afforded to cemeteries regardless of a formal dedication or record title.

> Where, by reason of operation of rules of real property resulting in dedication or other accepted methods of acquiring title to or easement in lands, or by reason of the effect of interment under rules of burial law, land has become charged with a right of burial use, the fee, if alienable, passes to a grantee subject to the burial rights.[36]

Beatty v. Kurtz established the principle that the courts of equity have the authority to protect burial grounds, the desecration of which is a "public nuisance." Perhaps because the courts cannot actively monitor burial grounds, courts across the United States have acknowledged for centuries that the kin of the deceased and, in some states, the general public, have the right to access burial places, even those located on private land, to maintain and protect the graves.

The leading common law case on this subject is *Hines v. State*.[37] In that case, the Tennessee Supreme Court, observed that:

> When land has been definitely appropriated to burial purposes, it cannot be conveyed or

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[36] Jackson, supra n. 14 at 250.

[37] 149 S.W. 1058, 1059 (Tenn. 1911).

> devised as other property, so as to interfere with the use and purposes to which it has been devoted. When once dedicated to burial purposes, and interments have there been made, the then owner holds the title to some extent in trust for the benefit of those entitled to burial in it, and the heir at law, devisee, or vendee takes the property subject to this trust. The right of burial extends to all the descendants of the owner who devoted the property to burial purposes, and they may exercise it when the necessity arises.[38]

This acknowledgement of the cemetery dedication at common law illustrates that the Ordinance is hardly "extraordinary." The Ordinance is consistent with well-established common law that recognizes implied servitudes under certain conditions, such as the presence of a burial ground on private land. The Ordinance did not create the burden of a right of access to burial grounds located on private property. Ms. Knick, like thousands of similarly-situated landowners across the United States, was burdened with this implied servitude when she acquired the subject property. Accordingly, as noted in the Respondents' merits brief in this matter, the pre-existing common law burden imposed on owners of burial grounds encompasses most, if not all, of the Ordinance, thus meaning that the Ordinance's enactment and application does not constitute a taking under the jurisprudence of this Court.[39]

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[38] *Id.*

Not only does the *Hines* Court support the notion that property such as Ms. Knick's is burdened with restrictions to protect against adverse impacts to the burial ground thereon, the Court further went on to state that:

> [The descendants] also have the right to visit the cemetery for the purpose of repairing, beautifying, and protecting the graves and grounds around the same, and for these purposes they have the right of ingress and egress from the public road nearest the cemetery, to be exercised at reasonable times and in a reasonable manner.[40]

Thus, in addition to concisely articulating the existence of the cemetery dedication as a pre-existing incident of property ownership, the *Hines* Court also acknowledged the correlative burden placed on the owners of burial grounds to permit access to that property for the purposes of visitation and maintenance.

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[39] Respondents' Merits Brief at 48 (citing the holding in *Lucas v. S. Car. Coastal Council*, 505 U.S. 1003, 1031 (1992), in which this Court observed that pre-existing legal burdens on property do not constitute takings).

[40] *Hines*, 149 S.W. at 1059.

Summarizing these burdens, the *Hines* Court held that:

> Those who purchase the property after it has been appropriated to burial purposes take it subject to the rights we have stated, without any express reservation in the will or deed under which they take. Such reservation is implied. The graves are there to be seen, and the purchaser is charged with notice of the fact that the particular lot has been dedicated to burial purposes, and of the rights of descendants and relatives of those there buried. Burial lots, whether public or private, are not the subject of trade and commerce, and it is always presumed that they are not included in the sale of property which surrounds them.[41]

Hines has been cited in common law right of access cases in Florida,[42] Georgia,[43] Kansas,[44] Kentucky,[45]

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[41] *Id.*

[42] *Mingledorff v. Crum*, 388 So.2d 632, 635–636 (Fla. Dist. Ct. App. 1980).

[43] *Haslerig v. Watson*, 54 S.E.2d 413 (Ga. 1949).

[44] *McCoy v. Barr*, 275 P.3d 914, 923 (Kan. App. 2d 2012).

[45] *Commonwealth v. Garner*, 896 S.W.2d 10, 13 (Ky. 1995).

Massachusetts,[46] Missouri,[47] Oklahoma,[48] and Texas.[49] Identical concepts exist in the civil law system.[50]

Other cases, while not citing *Hines*, certainly echo its sentiment. In *Humphreys v. Bennett Oil Corp.*,[51] a mineral production company sunk two oil wells into a rural cemetery in Louisiana.[52] When descendants of those interred in the cemetery sued the production company for, among other things, mental anguish, the Louisiana Supreme Court reacted harshly, with an uncharacteristically editorial decision. The court explicitly addressed the concept of the cemetery dedication when it stated the following:

> Regardless of the laws and rules relating to the ownership and control of real property, when a plot of ground is set apart for cemetery purposes, and burials are made in the land, the ground changes its character in the minds

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[46] *Sanford v. Vinal*, 552 N.E.2d 579, 585 (Mass. App. Ct. 1990).

[47] *Rhodes v. Nicklas*, 624 S.W.2d 504, 507–508 (Mo. Ct. App. 1981).

[48] *Heiligman v. Chambers*, 338 P.2d 144, 147–148 (Okla. 1959).

[49] *Davis v. May*, 135 S.W.3d 747, 750 (Tex. App. 2003); *White v. Williams*, 57 S.W.2d 385, 386 (Tex. Civ. App. 1933).

[50] La. Atty. Gen. Op. No. 08-0186; Ryan M. Seidemann, *Do Not Disturb: A Practical Guide for What Not to Do Around Cemeteries and Human Remains for the Louisiana Energy and Land Use Practitioner*, 2 LSU J. OF ENERGY L. & RESOURCES 239, 246-248 (2013).

[51] 197 So. 222 (La. 1940).

[52] *Id.* at 223.

> and feelings of the community. "It assumes a sacred quality that overrides conveyancers' precedents and requires freedom from profanation until, by abandonment and removal of the bodies or by complete disintegration, there remains nothing to appeal to the emotions of the survivors."[53]

With the above statement, the Louisiana Supreme Court unequivocally recognized that the presence of a cemetery on a tract of land fundamentally changes the character of that land such that the land cannot be used for anything other than a cemetery.

In *A.F. Hutchinson Land Co., Inc. v. Whitehead Bros. Co.*,[54] a New York court observed that land is dedicated as a cemetery by use of the property for cemetery purposes—the burial of human remains in or on the property.[55] Such a dedication "is a privilege or a license, not only to bury the dead . . . , but also the right of the living to place monuments or suitable decorations over the graves of their dead as memorials, and to preserve and beautify the premises."[56] In this case, the court relied on the CORPUS JURIS' statement that "[s]o long as a cemetery is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves, or so long as it is known or recognized by the public as a cemetery, it is not abandoned" when commenting that the cemetery dedication is virtually permanent.[57]

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[53] *Humphreys v. Bennett Oil Corp.*, 197 So. 222, 229 (La. 1940) (*quoting* Percival E. Jackson, THE LAW OF CADAVERS AND OF BURIALS AND BURIAL PLACES, 206 (1st ed. 1936)).

[54] 218 A.D. 682 (N.Y. App. Div. 1926).

[55] *Id.*

[56] *Id.* at 684.

In *Haslerig v. Watson*,[58] a landowner acquired land surrounding a cemetery that had been dedicated for public use. The landowner obstructed the roadway leading to the cemetery and was planning to build a fence when the plaintiffs sought injunctive relief to protect access to the site. The Georgia Supreme Court upheld the access rights of the descendants to the cemetery, finding that the land had been dedicated to such a use and that access to the property could not later be restricted once interments had been made.[59]

A similar concept exists in Pennsylvania where the current case is situated. In the matter of *In re Hunlock's Creek Cemetery*,[60] the court observed that a dedication of land to cemetery purposes requires no formality and that it occurs by operation of law *once burials are made*.[61]

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[57] *Id.* at 685.

[58] 54 S.E.2d 413 (Ga. 1949).

[59] *See also Garland v. Clark*, 88 So.2d 367 (Ala. 1956) (similar facts and same outcome).

[60] 16 Pa. D. & C. 152 (Penn. Ct. Comm. Pleas, Luzerne Cty. 1930).

[61] *Id.* at 153-154. *See also Roundtree v. Hutchinson*, 107 P. 345, 347 (Wash. 1910) ("It is true that there are no reservations in the deeds in the appellant's chain of title, but both he and his grantor, Wooley, had notice of the existence of the burying ground, and purchased subject to the rights the public had acquired in the property.").

As Justice Oliver Wendell Holmes observed, "[s]ince, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World."[62] Justice Holmes could not have been more correct and the cases reviewed above support this notion by demonstrating that the Ordinance at the core of this current dispute is merely a recitation of long-held common law concepts for the management and protection of the spaces of the dead. Accordingly, such restrictions and other burdens on private property for the protection and preservation of cemeteries are neither unreasonable nor inconsistent with the limitations on the uses of certain property that are recognized as permissible under the United States Constitution.

III. Many states have codified the common law right of access; none have been held to be takings.

Professor Alfred Brophy explained the common law right to access cemeteries in a 2006 law review article.[63] Professor Brophy noted that where burial grounds are located on private property, a conflict often arises between "the right of property owners to exclude and the veneration of age and of ancestors."[64] This conflict has resulted in the recognition by courts that "[r]elatives of people buried in cemeteries on private property have a common law right to access the property to visit the cemetery."[65] Brophy found that the right, which he characterizes as an implied easement in gross, is also codified in about 20% of the states.[66] The Pennsylvania General Assembly codified the right of access to burial grounds in 2017, stating that "every individual has a right to reasonable access for visitation to a burial plot" on private property.[67]

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[62] *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358, 366 (1910).

[63] Brophy, *Grave Matters*, supra n. 35.

[64] *Id.* at 1470.

These statutes, many of which grant rights of access to the public and not simply the descendants of the deceased, have been challenged in a handful of jurisdictions. No state or federal court has yet held that a codification of the common law right of access constitutes a taking.[68]

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[65] *Id.* at 1472. *See also* La. Atty. Gen. Op. No. 08-0186 for a similar analysis of the access concept at civil law.

[66] *Id. See, e.g.*, Ala. Code 1975 § 35-1-4; Fla. Stat. Ann. § 704.08; Mo. Ann. Stat. § 214.132; N.C. Gen. Stat. Ann. § 65-102; S.C. Code Ann. § 27-43-310; Tex. Health & Safety Code Ann. § 711.04; Va. Code Ann. § 57-27; W. Va. Code Ann. § 37-13A-1.

[67] Act of Dec. 21, 2017, Pub. L. No. 1205, No. 64 § 2, codified at 9 Pa. C.S. § 702(1).

[68] *See* Ryan M. Seidemann, *How Do We Deal With All the Bodies? A Review of Recent Cemetery and Human Remains Legal Issues*, 3 UNIV. OF BALTIMORE J. LAND & DEVELOP. 1 (2013); National Trust for Historic Preservation, *Minnesota Court Dismisses Inverse Condemnation Challenge to State Human Remains Statute*, 9(12) PRESERVATION LAW REPORTER 1158 (1990) (Minnesota).

In *Narragansett Improvement Co. v. Wheeler*,[69] the Rhode Island Supreme Court was presented with the question whether a government entity's identification of cemeteries on private property constituted a slander of the private party's title.[70] The identified cemeteries were Native American burial mounds that were documented on private property to assist in their protection.[71] In that case, as here, the court noted that because the documentation of these mounds was not a legal registration, no constitutional claims could lie against such action by the government.[72] Further, the court found that there was no slander of title by recommending the preservation of these sites, as the recommendations were not false and because the recommendations merely identified actual features on the property (*i.e.*, the cemeteries)[73] that, if they devalued the property, they did so regardless of the government's recommendations.[74] This outcome correctly absolved the government of liability for a taking[75] and is consistent with the idea that burial sites are generally inviolate[76] and that property owners acquire property subject to the possible existence of burials thereon.

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[69] 21 A.3d 430 (R.I. 2011).

[70] *Id.* at 432.

[71] *Id.* at 442-443.

[72] *Id.* at 439-441.

[73] *See Breneman v. United States*, 57 Fed.Cl. 571, 585 (2005) (holding the Federal Aviation Administration's determination that a hill and a fence on a plaintiff's property would constitute a hazard to air navigation did not amount to a "taking" because it had "no enforceable legal effect").

[74] *Narragansett*, 21 A.3d at 441-442.

[75] *Id.*

Similarly, in *Thompson v. City of Red Wing*,[77] a Minnesota appeals court observed that a law protecting human burials on private property did not rise to the level of an inverse condemnation. In so finding, the court held that such a regulation did not cause the landowners to be "deprived of all reasonable use"[78] of their land.

In *Davis v. May*,[79] the Court of Appeals of Texas considered whether Section 711.041 of the Texas Health and Safety Code, which provides in part that "[a]ny person who wishes to visit a cemetery or private burial grounds for which no public ingress or egress is available shall have the right to reasonable ingress and egress for the purpose of visiting the cemetery or private burial grounds," was unconstitutional and whether "the granting of a right of ingress and egress across the Davises' land is an unconstitutional taking of their property."[80] The court concluded:

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[76] *See, e.g.*, *Choppin v. Labranche*, 20 So. 681, 682 (La. 1896) (discouraging the disturbance of the dead except for "lawful necessary purposes"); *see also* T. Scott Gilligan & Thomas F.H. Stueve, MORTUARY LAW 49-53 (9th ed. 2005) (noting that disinterment is generally disfavored).

[77] 455 N.W.2d 512 (Minn. Ct. App. 1990).

[78] *Id.* at 516.

[79] *Davis v. May*, 135 S.W.3d 747 (Tex. App. 2003).

[80] *Id.* at 748.

> Because May and the other relatives of the decedents have a common law right of ingress and egress and because the Davises' title to the property was already burdened by this common law right, neither section 711.041 nor the trial court's ruling resulted in a "taking" of the Davises' property under the facts as presented. As a result, section 711.041 is constitutional as applied in this case, and no taking occurred.[81]

Laws similar to the challenged Ordinance have been subject to takings examinations by state courts in the past and they consistently pass muster. Again, there is nothing in the Ordinance that is "extraordinary" or "constitutionally suspect," as it was characterized by the Third Circuit. Ms. Knick owns property that contains a burial ground and, as a result, she must endure some amount of intrusion to ensure that the sacred and sensitive nature of the property remains intact and that the rights of the dead to an undisturbed repose are respected.

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CONCLUSION

The protection of human burial grounds is a matter of "respect for human dignity without reference to ethnic origins, cultural backgrounds, or religious affiliations."[82] As this review demonstrates, the Ordinance is not "extraordinary." There is no precedent for

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[81] *Id.* at 751.

[82] La. Rev. Stat. 8:672 (La. Acts 1991, No. 704).

Petitioner's claim that the Ordinance constitutes a taking under *Lucas*, as it is largely consistent with a long-standing, pre-existing incident of her property ownership. Indeed, the robust common law doctrines protecting the dead and the right of access strongly suggest that the Ordinance simply codified the common law of the Commonwealth of Pennsylvania. Accordingly, regardless of this Court's holdings with respect to the specific *Williamson County* questions presented by the parties, *amici* urge this Court to recognize that whether the Ordinance extends beyond the common law is a question more appropriately resolved in state court.

Respectfully submitted,

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No. 17-647

In the

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court? *See Arrigoni Enterprises, LLC v. Town of Durham*, 136 S.Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

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IDENTITY AND INTEREST OF AMICUS

The Center for Constitutional Jurisprudence[1] is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the protections for the natural right to own and use private property recognized in the Fifth Amendment. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing the constitutionality of property restrictions, including *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (cert. denied); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010).

SUMMARY OF ARGUMENT

The state-litigation requirement of *Williamson County* is contrary to the text and history of the Fifth Amendment. The rights protected in the Bill of Rights are not granted by governments, but are instead inalienable natural rights. One of the chief rights in this group is the individual right to own and use private property. The Founders sought to protect this inalienable right by imposing a condition on the exercise of government power to take or interfere with property. That condition was the payment of just compensation. Thus, when state or local governments take property without paying compensation, they have violated this restriction on the exercise of their powers. A requirement that an individual litigate his rights in private property, rights protected by the federal constitution, in state court simply ignores the text and history of the Constitution.

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[1] Pursuant to this Court's Rule 37.3(a), this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

ARGUMENT

The *Williamson County* State Litigation Requirement Is Inconsistent With The Text And History of the Takings Clause of the Fifth Amendment

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments, but are inalienable. 1 Stats 1 (Declaration of Independence ¶2). The Fifth Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The Takings Clause sets out both a condition for the exercise of government power and the remedy for the failure of that condition – Just Compensation.[2] *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 314 (1987).

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[2] We save for another day the argument that "public use" is also a condition set forth in the text of the Fifth Amendment.

The *Williamson County* state-litigation rule ignores the requirement of compensation as a *condition* on the exercise of government power over the ownership and use of private property. Instead, the state litigation requirement relegates "just compensation" to the status of a mere remedy. In so doing, it ignores the importance of ownership and use of private property in the scheme of inalienable natural rights that form the foundation of the American concept of individual liberty.

Recognition of the vital nature of individual rights in property predated the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 135 (Univ. of Chicago Press 1979) (1765).

The founding generation also relied on the writings of John Locke who noted that private property was natural, inseparable from liberty in general and actually preceded state's political authority. John Locke, SECOND TREATISE OF GOVERNMENT, (Indianapolis: Hackett Publishing Company, 1980) 111; James W. Ely, Jr., PROPERTY RIGHTS: THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (1997). Locke argued that government was formed to protect as "life, liberty, and estates" and Thomas Jefferson merely substituted "estates" with "pursuit of happiness" in the Declaration. Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE

STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (1980).

Alexander Hamilton, building on these concepts, noted the central role of property rights in the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, The Defense of the Funding System, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). This idea was also endorsed by John Adams, "Property must be secured, or liberty cannot exist." John Adams, Discourses on Davila, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

Our nation's Founders believed that all that which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 58-61 (Oct. 10, 1787) . From the beginnings of our country, and always in the minds of the Founders, these rights stood or fell together. Ely, *supra*, at 5.

This natural right to own and use property is not absolute. But if the government wants to take the property it must pay just compensation. This requirement is both a condition on the exercise of the power and a remedy for its abuse. The concept of just compensation is one imported by the Founders from English common law, and particularly the Magna Carta. *Horne v. U.S. Dept. Ag.*, 135 S.Ct. 2419, 2426 (2015). This source of the just compensation rule helps to understand *when* compensation must be paid.

The barons who compelled King John to sign Magna Carta brought forth several grievances, of importance here was the King's abuse of the royal right of "purveyance." Purveyance was the right of the king to "bu[y] up provisions and other necessaries ... at an appraised valuation, in preference to all others, and even without consent of the owner." 1 William Blackstone, COMMENTARIES 277. The King, in 1215, acting as the government, used his royal right of purveyance in a manner much the same as the modern day eminent domain. *See Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381 (1887) ("[Eminent domain] bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by the twenty-eighth section of *magna carta*."). While legally permissible for the Kings of England to requisition supplies in exchange for *prompt payment* of a market price, purveyance was prone to serious abuse. William Sharp McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, WITH AN HISTORICAL INTRODUCTION 330 (1914).

At the time Magna Carta was signed, there was no dispute that the King was required to pay for the provisions he took. *Id.* The issue then, as now, was with the timing and type of payment, which was often "indefinitely delayed or made not in coin but in exchequer tallies." *Id.* Instead of paying cash, the king's officers would "pay" with exchequer tallies. These tallies were sticks used to memorialize royal debts owed to particular subjects – essentially a Royal IOU. Marks would be made along the length of the stick to record the size of the debt, and then the stick would be split lengthwise. Each half of the stick would contain a portion of all of the lines, and because of irregularities in the wood, the sticks were difficult to forge. Each party would keep half of the stick; those halves later could be matched up to prove their authenticity.

But exchequer tallies were not necessarily negotiable in the same way as money because of the difficulty in proving to potential transferees that one half of a stick actually conformed to another half held by the Exchequer. So, in practice, Exchequer tallies' primary use was to offset the creditor's future taxes. *See* Christine Desan, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 175-185 (2014).

Magna Carta provided several distinct clauses that addressed the king's abuse of his right to purveyance which are relevant to the discussion of the Fifth Amendment's historical background the most vital of which is Clause 28. Clause 28 stated, "No constable or other bailiff of ours shall take corn or other provisions from any one without immediately tendering money therfor, unless he can have postponement thereof by permission of the seller." McKechnie at 329.

The Takings Clause of the Fifth Amendment imported these protections into the federal Constitution. As Justice Story noted, the Takings Clause is "an affirmance of a great doctrine established by the common law for the *protection of private property.*" 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (1833) (emphasis added).

In a sense, the *Williamson County* state-litigation requirement is akin to the old tally sticks from the Middle Ages in England. In much of the same way that tally sticks afforded no immediately tangible value to the individual whose property was taken (except a mere promise to pay a debt in the future), the state-litigation requirement offers a party with a takings claim a "chose in action" rather than immediate compensation.

This view that payment of compensation was a condition on the exercise of government's power to take property is nothing new. Justice Brennan, in his dissenting opinion in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981), noted "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation." Prior to the decision in *Williamson County*, this Court routinely recognized that payment of just compensation was a condition on the exercise of the power of government to take private property. *See Danforth v. United States*, 308 U.S. 271, 283-84 (1939) ("compensation is due at the time of taking...."); *Seaboard Air Line Ry. Co. v. U.S.*, 261 U.S. 299, 306 (1923) ("[I]t was the duty of the government to make just compensation as of the time when the owners were deprived of their property." (Citation omitted)); *U.S. v. Dickinson*, 331 U.S. 745, 751 (1947) ("[T]he land was taken when it was taken and an obligation to pay for it then arose."); *U.S.*

v. Dow, 357 U.S. 17, 20 (1958) ("For it is undisputed that '(since) compensation is due at the time of taking, the owner at that time ... receives the payment.").

The *Cherokee Nation* decision is not to the contrary. There, Congress exercised its power of eminent domain and created a commission for the purpose of calculating the compensation due. *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641 (1890). Indeed, the litigation over the compensation occurred before the property was taken. *Id.* Importantly, Congress recognized that actions taken pursuant to the statute required the payment of compensation. The state-litigation requirement of *Williamson County*, by contrast, involves state and local entities that claim no taking has occurred. Compensation is not the primary issue in the state litigation. Instead, the issue is whether the *federally protected right* has been violated. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 345 (2005). There is simply no basis for *requiring* litigation of federal constitutional rights in state courts.

The *Williamson County* state-litigation rule ignores the text and history of the constitutionally protected rights in private property. *See, e.g., San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J. joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment) ("*Williamson County's* state-litigation rule has created some real anomalies, justifying our revisiting the issue ... [the rule] all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee."); *Stop the Beach Renouirshent, Inc. v. Fla.*

Dep't of Envtl. Prot., 560 U.S. 702, 742 (2010) (Kennedy, J., concurring in part and concurring in the judgment) ("Until *Williamson County* is reconsidered, litigants will have to press most of their judicial takings claims before state courts...."); *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting from denial of cert., joined by Kennedy, J.).

CONCLUSION

The Court should return to the original understanding of the Takings Clause. The compensation requirement is a condition on the power of the government to take private property. Requiring litigation in state court over this federally protected constitutional right serves no purpose.

DATED: June, 2018

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No. 17-647

In The
Supreme Court of the United States

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ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, *et al.*,
Respondents.

◆

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

◆

BRIEF OF AMICI CURIAE CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND AND INVERSECONDEMNATION.COM IN SUPPORT OF PETITIONER

◆

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QUESTION PRESENTED

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court? *See Arrigoni Enterprises, LLC V. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

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INTEREST OF AMICI CURIAE[1]

Citizens' Alliance for Property Rights Legal Fund is a Washington state non-profit 501(c)(3) which handles the legal defense of our property rights as well as the education of citizens, politicians, and bureaucrats on property rights issues. It is an affiliated organization of Citizens' Alliance for Property Rights, which was organized in 2003 as a nonpartisan entity where individual citizens and other organizations can work together to protect property rights. Together, they support equitable and scientifically sound land use regulations that do not force private landowners to pay disproportionately for public benefits enjoyed by all. They protect everyone's rights by presenting a single coordinated voice dedicated to preserving and protecting individual property rights, and to reducing the regulatory cost of property ownership.

Inversecondemnation.com is a law blog, published since 2006 by undersigned Counsel of Record, which focuses on recent developments and analysis of regulatory takings, eminent domain, inverse condemnation, property rights, and land use law.

We are submitting this brief because *Williamson*'s state exhaustion requirement is an anomaly, and wrongly relegates property rights to the status of "poor relation" in the constitutional canon. When asked by our constituents and our clients why a federal court cannot review a claim that a state or local government is violating the federal constitution (unlike every other right in the Bill of Rights), we have no good response to explain *Williamson*'s rationale, or its effect.

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[1] All parties have filed with the Clerk a letter granting blanket consent to amicus briefs. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund this brief's preparation or submission.

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SUMMARY OF ARGUMENT

Our brief makes two main points. First, to show the corrosive effect *Williamson* has on the average property owner's reasonable assumption that she can bring a federal constitutional claim in federal court. Second, to point out a foundational flaw in *Williamson*, and to highlight a particularly egregious example of how that case is employed to run owners though a pointless maze.

ARGUMENT

I. THE AVERAGE LANDOWNER CAN'T UNDERSTAND WHY A MONKEY CAN GET TO FEDERAL COURT, BUT PROPERTY OWNERS CANNOT

A monkey—*a monkey!*—has the keys to the federal courthouse door to assert its property rights in a "selfie." *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (the court concluded Naruto has Article III standing, but no standing under the Copyright Act; the case is pending the *en banc* process).[2] Federal courts regularly entertain cases about whether—contrary to Chris Rock's dictum—something untoward really might be going on in the Champagne Room.[3] *See, e.g., Flanigan's Enters. v. Fulton County*, 596 F.3d 1265 (11th Cir. 2010) (challenging ordinance prohibiting alcohol sales at nude dancing establishments). A local law interferes with your desire to create Valentine's Day artwork out of live nude bodies? Go straight to federal court, no questions asked. *See, e.g., Sole v. Wyner*, 551 U.S. 74 (2007). City animal control officers take a homeless man's 18 diseased pigeons and his pet crow and seagull? Go straight to federal court, too (just be sure to couch the claim as a violation of the Fourth Amendment, not the Fifth). *See Recchia v. City of Los Angeles*, No. 13-57002, 2018 U.S. App. LEXIS 11364 (9th Cir. May 1, 2018). But if a state or local government infringes on a Fifth Amendment property right? Go to state court. And stay there: as a consequence of *Williamson*'s state procedures requirement and the you're-either-too-early-or-you're-too-late trap endorsed by *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), federal courts simply do not "do" takings, unless the government decides to remove it. *See City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 164 (1997).

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[2] Although the law may not be an ass, it seems it might be a monkey. *Cf. Collins v. Virginia*, No. 16-1027, 2018 U.S. LEXIS 3210 at *33 (U.S. May 29, 2018) (Alito, J., dissenting) ("The Fourth Amendment is neither an 'ass' nor an 'idiot.'").

[3] *Cf.* Chris Rock, *No Sex (in the Champagne Room)*, on *Bigger & Blacker* (DreamWorks Records 1999).

To a lawyer's eyes, *Williamson*'s state procedures requirement might charitably be called opaque; but to landowners who needlessly must budget years of legal fees if they want to even think about ripening a federal constitutional takings claim for federal court, it is impossibly dense. *See* Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J. L. & Pol'y 99, 103 (2000) ("Ripeness rules are used as an offensive weapon to delay litigation, increase both fiscal and emotional costs to the property owner, and convince potential plaintiffs that they should not even try to 'fight city hall.'") (internal citations omitted). The Sixth Circuit summed up well the odyssey on which property owners must embark:

> [I]t is obvious to us that, left to the devices of the Village's counsel, this case will become another *Jarndyce v. Jarndyce*, with the participants "mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their . . . heads against walls of words, and making a pretence of equity. . . ." For nearly ten years, the Kruses have endeavored to vindicate their property rights guaranteed by the Constitution and by state statutes. The Village's actions threaten to turn the Kruse family into generations of "ruined suitors" pursuing legal redress in a system "which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope" as to leave them "perennially hopeless." Enough is enough, and then some.

Kruse v. Vill. of Chagrin Falls, 74 F.3d 694, 701 (6th Cir. 1996) (quoting Charles Dickens, Bleak House (Oxford University Press ed. 1989)). How do we explain this unequal treatment—this "procedural monster"—to landowners? Berger, *Supreme Bait & Switch*, 3 Wash. U. J. L. & Pol'y at 102 (*Williamson* transformed "the ripeness doctrine from a minor anomaly into a procedural monster"). *Williamson*'s state exhaustion requirement certainly could not have been intended to be a tool to financially bleed out property owners by running them through a time-consuming and ultimately pointless maze.

This Court appreciates that its rulings have real-life consequences for litigants and the lawyers who try to apply them. Most recently, in *Upper Skagit Indian Tribe v. Lundgren*, No. 17-387, 2018 U.S. LEXIS 3085 (May 21, 2018), the Chief Justice (joined by Justice Kennedy) focused on the practical consequences of the majority ruling on the parties, and the need for "a meaningful remedy." *Id.* at *13 (Roberts, C.J., concurring). Justices Thomas and Alito expressed similar concerns about leaving litigants "in limbo," and the associated costs. *Id.* at *16 (Thomas, J., dissenting) ("It forces the Lundgrens to squander additional years and resources litigating their right to litigate."). The procedures for vindicating federal constitutional rights should be accessible to the ordinary landowner. *See Collins v. Virginia*, No. 16-1027, 2018 U.S. LEXIS 3210 at *33 (U.S. May 29, 2018) (Alito, J., dissenting) (noting how "[a]n ordinary person of common sense would react" to a ruling); *Brody v. Vill. of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005) ("It is not likely that the average landowner would have appreciated [the short repose period in New York condemnation law]."').[4] In the end, legal rules should be considered through the lens of the parties who must bear the cost of putting them into action. If an owner cannot understand why the federal courthouse doors are closed—and why the courts are reduced to resolving esoteric pleading games and not the merits—those rights are in danger of becoming meaningless. In that spirit, we present the following, an attempt to squeeze three decades of property owners' views of *Williamson*'s exhaustion requirement into a popular five-panel "meme."

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[4] *See also M.A.K. Inv. Group, LLC v. City of Glendale*, No. 16-1492, 2018 U.S. App. LEXIS 12468 (10th Cir. May 14, 2018) (thirty days is enough for landowner to research what procedural avenues for relief are available).

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Some context may be helpful. User-added text and a series of still photos lifted from a now-cancelled reality television program are combined to succinctly illustrate the competing viewpoints in an argument:

> American Chopper Argument refers to a scene from American reality TV show *American Chopper* in which Paul Teutul Sr. and Paul Teutul Jr. get in a shouting match about Jr.'s tardiness. Since its original airing in 2009, the explosive scene has spawned an exploitable photocomic series that humorously illustrate various debates in pop culture fandom.

American Chopper Argument, Know Your Meme, http://knowyourmeme.com/memes/american-chopper-argument (last visited May 31, 2018).[5]

Admittedly, its use here does not capture much of whatever nuance might be lurking in the *Williamson* majority's rationale. *See* Matthew Yglesias, *The American Chopper meme, explained—It all goes back to Plato*, Vox (Apr. 10, 2018) ("American Chopper more than makes up for its aesthetic shortcomings with its ability to present complicated ideas. . . . More broadly, in an era of performative social media dunking and tribalism run amok, the Chopper offers a lighthearted way to demonstrate that you actually understand the viewpoints of people on both sides of an issue."). But it does strip the state procedures requirement to its essential core: file a federal takings claim in federal court and the presumption is that it is premature because the state has not yet denied just compensation; you need to try and force the government to pay, which includes suing in state court for compensation—and lose that claim—before the federal court can even consider whether the Fifth and Fourteenth Amendments have been violated. But by doing so, you will later be deemed to have litigated the federal claim (even if you didn't) and will be precluded from doing so "again."

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[5] A meme is "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." *Meme*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/meme (last visited June 1, 2018).

Property owners should not be caught up in a procedural trap applicable "to no other species of litigant." Berger, *Supreme Bait & Switch*, 3 Wash. U. J. L. & Pol'y at 103 ("government lawyers have learned to play the ripeness game like Perlman on a Stradivarius"). The state procedures rule has managed to cut a swath of destruction through takings doctrine and property owners' wallets, and unless checked by this Court, will continue to do so. *Williamson*'s costly three-decade experiment with property owners' rights has run its course and come up short. It should be jettisoned for good.

II. THE STATE EXHAUSTION REQUIREMENT IS RIPE FOR ABANDONMENT

This case presents the Court with a long-overdue opportunity to right the ship and return Fifth Amendment property rights to their coequal status. The last time this Court considered *Williamson*'s takings ripeness requirements in an argued case, the property owners did not ask the Court to overrule or revisit the state procedures requirement. An exchange with Justice O'Connor went like this:

> JUSTICE O'CONNOR: And you haven't asked us to revisit that Williamson County case, have you?
>
> MR. UTRECHT: We have not asked that this Court reconsider the decision in Williamson County.
>
> JUSTICE O'CONNOR: Maybe you should have.

Oral Argument Transcript, *San Remo Hotel, L.P. v. City and County of San Francisco*, No. 04-340 (Mar. 28, 2005). This time, however, Petitioner did not take the same approach and has squarely asked the Court to revisit the state litigation requirement.

A. *Williamson*'s Mistaken Foundation: Tennessee Did Not Recognize A Compensation Remedy Until 2014

We first note *Williamson*'s erroneous foundation, the majority opinion's conclusion that Tennessee property owners could—and therefore must—pursue compensation for a regulatory taking under Tennessee law:

> The Tennessee state courts have interpreted § 29-16-123 to allow recovery through inverse condemnation where the "taking" is effected by restrictive zoning laws or development regulations.

Williamson, 473 U.S. at 196 (citing *Davis v. Metropolitan Govt. of Nashville*, 620 S.W.2d 532, 533-534 (Tenn. App. 1981); *Speight v. Lockhart*, 524 S.W.2d 249 (Tenn. App. 1975)).

The problem was that the only Tennessee court that mattered—the Tennessee Supreme Court—had actually *not* interpreted the statute that way, and would not do so for another 29 years. Indeed, at the time of *Williamson*, that court limited recovery of compensation under the inverse condemnation statute to physical occupation and "nuisance-type" takings, as it later recognized in *Phillips v. Montgomery County*, 442 S.W.3d 233 (Tenn. 2014):

> It is true that until today this Court has recognized only physical occupation takings and nuisance-type takings.
>
> . . . .
>
> We hold that, like the Takings Clause of the United States Constitution, article I, section 21 of the Tennessee Constitution encompasses regulatory takings and that the Property Owners' complaint is sufficient to allege a state constitutional regulatory taking claim, for which they may seek compensation under Tennessee's inverse condemnation statute, Tennessee Code Annotated section 29-16-123.

Id. at 243, 244. *See also id.* at 242 (the issue of whether compensation under the inverse condemnation statute was available for regulatory takings claims was "an issue of first impression for this Court.").

In short, *Williamson* was simply wrong when it concluded the property owner had a compensation remedy under state law and therefore was required to use it.

B. One Particularly Egregious Procedural Game Highlights How *Williamson* Whipsaws Property Owners Between State And Federal Courts

This section of our brief highlights one of the most unfair consequences of *Williamson*'s exhaustion requirement: how, when combined with the government's power to remove federal takings cases, it allows property owners to be bludgeoned by procedural games, and how *Williamson*'s exhaustion rule, designed to ensure federal takings claims are ready for federal review, have instead ripened into a nearly impossibly high wall around federal courts.[6]

In *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), this Court held that a takings claim, filed by the property owner in state court could be removed by the defendant to federal court as a matter "arising under" the Constitution. *Id.* at 161, 164. The majority never mentioned the *Williamson* state litigation requirement, nor that case's rationale that a "takings" claim is complaining about the lack of state-provided compensation, not the unconstitutional taking. Employing *Int'l College*, governmental defendants enjoy the option of a federal forum, even where property owner plaintiffs do not. The asymmetry alone should be enough to jettison *Williamson*.

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[6] "Mission creep" has set in, and claims subject to *Williamson* are not limited to regulatory takings; physical takings claims have also been subject to the state exhaustion requirement. *Peters v. Vill. of Clifton*, 498 F.3d 727, 732 (7th Cir. 2007); *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 294-95 (5th Cir. 2006); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003). Procedural due process claims as well. *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1156 (2015). And in *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118 (2d Cir. 2014), the Second Circuit applied the doctrine to a claim under the Americans With Disabilities Act. It has even been applied by the Federal Circuit to affirm the Court of Federal Claims' dismissal of a Fifth Amendment takings claim against the federal government. *Alpine PCS, Inc. v. United States*, 878 F.3d 1086 (Fed. Cir. 2018).

But where this exercise becomes especially unjust is when—after removing a state-filed compensation claim case to federal court based on federal question jurisdiction—the defendant argues under *Williamson*'s state procedures requirement that the case which they removed is not ripe for federal court review *because the compensation claim was not raised in state court*.

Some courts don't buy this tactic. *See, e.g., Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (city removed case to federal court, and on the eve of trial sought remand under *Williamson*; court rejected the argument, concluding, "the City having invoked federal jurisdiction, its effort to multiply these proceedings by a remand to state court smacks of bad faith"). *See also Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014); *Sansotta v. Town Nags Head*, 724 F.3d 533, 544-47 (4th Cir. 2013); *Key Outdoor Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003).

But many do. *See Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-04 (8th Cir. 2006); *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003) (dismissing case on appeal because district court did not have jurisdiction to resolve takings claims that were removed from state court); *Ohad Assocs., LLC v. Twp. of Marlboro*, Civil No. 10-2183 (AET), 2011 U.S. Dist. LEXIS 8414, at *3, 6-8 (D.N.J. Jan. 28, 2011); *8679 Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569-MCE-EFB, 2010 U.S. Dist. LEXIS 93303, at *4, 13-14 (E.D. Cal. Sept. 8, 2010); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174-75 (D. Kan. 1999); *see also Del-Prairie Stock Farm, Inc. v. Cnty. of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis.

2008) (recognizing the incoherent application of the *Williamson* state litigation requirement and remanding a removed case to state court rather than dismiss the takings claims).

Warner v. City of Marathon, 718 Fed. Appx. 834 (11th Cir. 2017) (per curiam) exemplifies these latter cases. There, Florida property owners raised a regulatory takings claim in Florida state court. A prudent move, given *Williamson*. The city removed the case as a federal question, exercising its *Int'l College* power. The district court dismissed the case as unripe under *Williamson*'s state procedures requirement, and the Eleventh Circuit affirmed.

Wait a minute, the property owner argued, we did what the Supreme Court told us in *Williamson* we had to do: we brought our takings claim in a Florida court, asking for compensation through available state procedures, so we're not here in federal court willingly: we were ripening our federal claim in state court when *the city* removed us to federal court.

But the Eleventh Circuit rejected that argument, concluding the case wasn't ripe because the property owners had not secured a *denial* of their compensation claim by the state court:

> The plaintiffs also did not allege in their complaint that they availed themselves of this remedy and were denied relief. Instead, the plaintiffs seem to assert on appeal that the takings claim presented in their complaint is their just compensation claim. Notwithstanding the possibility that they were attempting to assert an inverse condemnation claim in Florida state court before the case was removed to federal court, we cannot re-

> view the claim until the plaintiffs have been denied relief by a Florida court.

Id. at *10-*11.

Just how were the plaintiffs supposed to be denied compensation in state court when the city removed it before they could pursue relief there? Nonetheless, the court affirmed the district court's dismissal of the takings claim for lack of subject matter jurisdiction (without prejudice), which effectively served as a remand order of the city's removal. Thus, the case was back in state court. Although the property owner lost time (and attorneys' fees), it did not lose the case.

Even if so, the case highlights the foolishness that *Williamson* has spawned, because if the plaintiffs went back to state court (where they were originally) and filed a new suit against the city, what would prevent the city from removing it yet again? This case is just one example of the very real problems *Williamson* has enabled.

CONCLUSION

For more than three decades, the state procedures requirement has confused litigants, fractured courts, and has forced property owners to assert their federal constitutional rights in state courts, most never to see the light of day again. Until *Williamson*'s state procedures requirement is finally relegated to history's dustbin, this confusion and injustice will continue. All that property owners ask for is the same opportunity afforded others who assert their federal constitutional civil rights claims: the chance to have a federal court adjudicate their federal rights, nothing more.

Respectfully submitted.

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Amicus Curiae Brief Of Institute For Justice, Owners Counsel of America, and Professor Daniel R. Mandelker, Supporting Petitioner

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INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae* file this brief in support of the Petitioner,[1] seeking reversal of the "ripeness" requirement in *Williamson County Regional Planning Agency v. Hamilton Bank*, 473 U.S. 172 (1985) that compels property owners seeking compensation for regulatory takings to sue (and lose) in state court before being able to seek relief in federal court. The cruel reality is that such relief in federal court is never available under this formula.

The Institute for Justice (IJ) is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of IJ is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

IJ is also committed to the idea that the protection of individual rights requires an engaged federal judiciary that stands ready to defend those rights when they are infringed. For too long, however, the doors of federal courts have been all but closed to property owners seeking to vindicate their Fifth Amendment rights. While, in every other area that IJ litigates, violation of a federal constitutional right entitles (and should entitle) a citizen to a federal constitutional remedy, property owners are routinely denied access to a federal forum for regulatory takings.

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[1] Counsel for the *amici curiae* authored this brief alone and no other person or entity other than the *amici curiae*, its members or counsel have made a monetary contribution to the preparation or submission of this brief. Both the Petitioner and the Respondents consented to the filing of this brief by stipulations filed with the Court. The *amici curiae* timely notified counsel for the parties that we intended to file this brief.

Owners Counsel of America (OCA) is a non-profit organization sustained by its members. OCA brings unique experience as a network of the most experienced eminent domain and property rights attorneys from across the country seeking to preserve, defend, and advance the rights of private property owners. OCA agrees that the freedom to own and use private property is "the guardian of every other right" and the basis of a free society. See James W. Ely, *The Guardian Of Every Other Right: A Constitutional History Of Property Rights* (2d ed. 1998)). OCA leverages its members' combined knowledge and experience in the defense of private property ownership in an effort to make the right to own private property available and effective to all property owners nationwide. OCA member attorneys have litigated landmark cases in almost all fifty states and many have been counsel of record for a party or amicus in eminent domain and takings cases that this Court has considered in the past forty years. OCA members author treatises, books, and articles on takings including chapters in the seminal treatise *Nichols On Eminent Domain*. Many of them serve as adjunct faculty at law schools in all parts of the country, teaching courses in takings, land use, zoning, and property law in general.

Professor Daniel R. Mandelker is the Howard A. Stamper Professor of Law at Washington University in St. Louis. One of the country's leading scholars in land use law, he is the co-author of *Planning And Control Of Land Development*, now in its ninth edition, *Land Use Law, Federal Land Use Law*, and *Nepa Law And Litigation*, to name only a few of his current works. An active scholar in the field, Prof. Mandelker has studied and lectured about all aspects of land law for nearly 70 years, teaching courses in constitutional law, land use law, state and local government law and environmental law. He has long been a critic of the *Williamson County* ripeness rule, having long ago co-authored an article entitled Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use Law & Zoning Digest, No. 1, p. 3 (Jan. 1990). Having written that article nearly 30 years ago, Prof. Mandelker has remained interested in eradicating what he sees as a serious error in constitutional interpretation that keeps federal constitutional cases from being litigated on their merits in federal courts.

INTRODUCTION

This brief is filed on behalf of a broad amicus coalition to demonstrate the widespread agreement of practitioners, public interest organizations, and academics that experience with the formula established in *Williamson County* in 1985 for determining ripeness in regulatory taking cases has been an abject failure at all levels. Thus, the amici joined in this brief consist of a non-profit public interest organization dedicated to the advancement of the rights of individuals — the Institute for Justice; a national organization of practicing lawyers who represent property owners in constitutional (i.e., takings and eminent domain) litigation — Owners Counsel of America; and one of the Nation's leading land use law scholars who has studied, taught, and written numerous books and articles about all phases of land use law for nearly 70 years — Professor Daniel R. Mandelker of Washington University in St. Louis. They are filing this brief together to help the Court understand the breadth and depth of the practical and jurisprudential issues raised by *Williamson County Reg. Plan. Agency v. Hamilton Bank*, 473 U.S. 172 (1985) as seen from their varying perspectives and the reasons why allowing state courts to act as gatekeepers barring entry to federal courts on this fundamental federal constitutional issue is as legally wrong as it is pragmatically unnecessary.

SUMMARY OF ARGUMENT

1. Both *Williamson County* and this case were brought under the Federal Civil Rights Act, 42 U.S.C. § 1983. Such cases are probably the worst cases in which to inject a state court litigation requirement. As this Court has held, the point of section 1983 was to "interpose the federal courts *between the States and the people*, as

guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (emphasis added). There is no room in that formulation for a rule that interposes the state courts as a bar to federal court access.

2. Deferring to state courts is tantamount to granting states a veto over access to federal courts, making them de facto federal court gatekeepers. This is contrary to settled precepts. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Felder v. Casey*, 487 U.S. 131, 144 (1988).

3. It is time for the Court to reconsider — and reject — *Williamson County's* state court litigation requirement, which demands state court confirmation that there is no state remedy for a governmental taking of property before allowing a Fifth Amendment claim to be held "ripe" for federal court litigation. The premise of that rule goes beyond both the language and meaning of the Fifth Amendment. A municipality's taking of private property without just compensation is complete *when* property is taken and compensation is not paid *by the government agency taking the action*. It does not require any judicial determination to complete, or ripen, the taking. And, if it did, there is no reason why such a determination must take place in state court.

ARGUMENT

The core issue in this case is one that has caused confusion and injustice since this Court's decision in *Williamson County*. The issue is whether property owners claiming that government action has taken their property without just compensation in violation of the Fifth Amendment to the U.S. Constitution have the right — like other constitutional claimants — to have their cases decided on the merits in federal courts.

As the Court held, for example, in *Bell v. Hood*, 327 U.S. 678, 681–82 (1946), a complaint seeking compensation for violation of the Fourth and Fifth Amendments belongs in federal court *if the plaintiff so chooses*. If, as the Court plainly held in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1992), property rights are not to be some "poor relation" among the guarantees in the Bill of Rights, then the anomalous refusal to permit federal litigation of regulatory takings claims needs to end.

I.

THE U.S. CONSTITUTION PROVIDES A FLOOR OF PROTECTION. STATES CANNOT PROVIDE LESS

The point of our Constitution in general — and its Bill of Rights, in particular — is to provide a baseline of minimal protection to all the rights of all citizens, with individual states having the discretion to provide *more, but never less* protection. *West Virginia State Board of Educ. v. Barnette*, 319

U.S. 624, 637–8 (1943). If there is a role for state courts and state laws, this is it: providing *more* protection than the U.S. Constitution mandates.

As Professor Akhil Amar summarized it, "the federal constitution stands as a secure political safety net—***a floor below which state law may not fall.***"[2] Any conflicting state law is simply "without effect."[3] In other words, as the Court classically held in ***Marbury v. Madison,***[4] it is the Court's job to see that other levels of government remain true to the Constitution. That would include protecting the rights of property owners from the depredations of state and local government. Here, that is done by enforcing the will of Congress to provide protection against state agencies and officials, regardless of what state law might otherwise say. U.S. Const. art. VI, cl. 2.

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[2] Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1100 (1988) (emphasis added). See also Gideon Kanner, *Just How Just is Just Compensation?* 48 Notre Dame L. Rev. 786, 784 (1973) ("[I]t seems safe to say that the Constitution—or at least the Bill of Rights—was the product of the framers' fear of an overreaching government, and their desire to protect individual citizens from governmental excesses. . . . [T]he purpose of the . . . Bill of Rights [] was to protect the people from the government, not vice versa.")

[3] *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

[4] 5 U.S. (1 Cranch) 137, 177 (1803).

II.

STATE COURTS CANNOT SERVE AS GATEKEEPERS, BLOCKING THE ENTRY OF PROPERTY OWNERS TO FEDERAL COURTS

Deferring to state courts is tantamount to granting states a veto over access to federal court, making them de facto federal court gatekeepers. The Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Felder v. Casey*, 487 U.S. 131, 144 (1988).

Indeed, to relegate Section 1983 suits to control by state courts (as *Williamson County* does with respect to regulatory takings) is to ignore the entire history of the statute. As the Court summarized in *Felder*, 487 U.S. at 147:

> Congress enacted § 1983 in response to widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers.

How ironic that property owners in regulatory taking cases find themselves shunted right back to the very courts that Congress intended to shield them from.

"[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors[,]" *Felder*, 487 U.S. at 141, *by "interpos[ing] the federal courts between the States and the people,* as guardians of the people's federal rights[.]" *Mitchum*, 407 U.S. at 242 (emphasis added).

To effectuate those goals, Congress intended to "*throw open the doors of the United States courts*" to those who had been deprived of constitutional rights "and to provide these individuals *immediate access to the federal courts . . .*" *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 504 (1982) (emphasis added).

Far from being "thrown open," the federal courthouse doors have been slammed shut to regulatory taking victims since *Williamson County* was decided more than 30 years ago.

Put another way, section 1983 is one of the most consequential laws passed by Congress. It was enacted to enforce the protections intended by the Fourteenth Amendment.[5] Its goal was a significant restructuring of the relationship between the citizens of the states and the local and state officials in those states, with the courts of the United States acting as guarantors of federal rights. See *Mitchum*, 407 U.S. at 238-39. In other words, the "dominant characteristic" of such actions is that "they belong in court." *Burnett v. Grattan*, 468 U.S.42, 50 (1984). And, by that, the Court plainly intended to focus on "belong[ing]" in *federal* court, because it emphasized that the judicial remedy exists "independent of *any other* legal or administrative relief that may be available as a matter or federal *or state law*. They are judicially enforceable in the first instance." *Ibid.* (emphasis added).

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[5] Section 5 of that Constitutional provision granted Congress "the power to enforce, by appropriate legislation, the provisions of this article."

In the Court's stirring words:

> "We yet like to believe that *wherever the Federal courts sit*, human rights under the Federal Constitution are *always* a proper subject for adjudication, and that *we have not the right to decline* the exercise of that jurisdiction simply because the rights asserted *may be adjudicated in some other forum*."

McNeese v Board of Education, 373 U.S. 668, 674, n.6 (1963) (emphases added) (quoting with approval *Stapleton v. Mitchell*, 60 F. Supp. 51, 55 (D. Kan. 1945), *appeal dismissed pursuant to stipulation* 326 U.S. 690).

To those who have found their property rights regulated into near or total valuelessness since *Williamson County*, the Court's words ring hollow. They need to have life breathed back into them by overruling *Williamson County* and once again "throw[ing] open the doors of the United States courts" for "immediate access" as envisioned in *Patsy*, 467 U.S. at 504.)

This theory of protecting *federal* rights in *federal* courts dates to the founding of the Republic (i.e., it predates adoption of either the Fourteenth Amendment or Section 1983), and makes clear why *Williamson County* is historically and doctrinally mistaken. As James Madison bluntly put it, ". . . a review of the constitution of the courts in the many states will satisfy us that they cannot be trusted with the execution of federal laws." 1 Ann. Cong. 813, *quoted in Greenwood v. Peacock*, 384 U.S. 808, 836 (1966) (Douglas, J., dissenting); see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-348 (1816); *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 87 (1809).

Williamson County's state court litigation mandate inverted this basic building block of 42 U.S.C. § 1983: it interposed state courts to shield municipalities from federal accountability. Having watched lower courts and local governments experiment with that wrong-headed view of the law, it is time for this Court to set things right.

Indeed, any requirement to file an unsuccessful suit to establish that there is no remedy under state law would contravene not only Section 1983, but subsequent Congressional action as well. Since adopting Section 1983, Congress has clearly reinforced the need for strongly enforcing that bedrock civil rights law. Any required suit for payment would be contrary to Congressional policy established in 1970 in the Uniform Relocation Assistance and Real Property Acquisition Policies Act, which provides that the days when government could simply grab property first and then say "sue me" to the aggrieved owner are over. Cf. *Stringer v. United States*, 471 F.2d 381, 384 (9th Cir. 1973); *United States v. Herrero*, 416 F.2d 945, 947 (9th Cir. 1969). That Act makes it illegal for government agencies to make it necessary for property owners to sue for their just compensation. Rather, the duty is the government's to acquire whatever property interests are needed for the public good, either by negotiation (42 U.S.C. § 4651(1)) or, failing that, condemnation (42 U.S.C. § 4651(8)).[6]

Moreover, mandating suit in state court adds to the Fifth Amendment a remedial requirement contrary to its plain words. The just compensation language has repeatedly been read by this Court as a limitation on government's power (i.e., that the power of eminent domain is subject to two preconditions — public use and just compensation). It is not an invitation for an injured property owner to sue for payment, as the Relocation Act now makes clear. That is why the Court has held the Just Compensation Clause to be self-executing. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

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[6] The Act provides succinctly: "No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." 42 U.S.C. § 4651(8). To make this a truly "uniform" law, as its title advertised, the policies in section 4651 were made applicable to the states — by directing that federal funds could not be spent on state projects unless the state agreed to comply with these policies. 42 U.S.C. § 4655.

In any event, if suit is required to demonstrate the actuality of a Fifth Amendment violation, there is nothing in the Fifth Amendment directing that the only place to seek that determination is in state court. As state and federal courts have concurrent jurisdiction to decide constitutional claims, the choice of forum, as in other cases, should belong in the first instance to the plaintiff. *Bell*, 327 U.S. at 681 ("the party who brings a suit is master to decide what law he will rely upon").

III.

THE WHOLE POINT OF 42 U.S.C. § 1983 WAS TO PROVIDE FEDERAL COURTS FOR THE PROTECTION OF FEDERAL RIGHTS

Section 1983 has been before the Court on many occasions and has been oft-explained. As the Court has repeatedly stressed, a Section 1983 case is a "species of tort liability" (*Heck v. Humphrey*, 512 U.S. 477, 483 (1994)), specifically, a statutorily created "constitutional tort" (*Jefferson v. City of Tarrant*, 522 U.S. 75, 79 (1997)) that sweeps within its ambit all manner of governmental actions that defy Bill of Rights protections. Section 1983 was intended by Congress to expose municipalities and local officials to "a new form of liability." *City of*

Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981). Properly so.

"The very purpose of § 1983 was to . . . *protect* the people from unconstitutional action *under color of state law*, whether that action be executive, legislative, or judicial." *Patsy*, 457 U.S. at 503 (emphases added; quotation marks omitted). This was not the sole purpose, however. Another important purpose was "to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). This form of liability "runs only against a specific class of defendants: government bodies and their officials." *Felder*, 487 U.S. at 141. In other words, it was Congress' judgment "that all persons who violate federal rights while acting *under color of state law* shall be held liable for damages" (*Haywood v. Drown*, 556 U.S. 729, 737 (2009)) and that all "persons injured by deprivation of federal rights and . . . abuses of power by those acting under color of state law" would be compensated. *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978).

Section 1983 was intended to provide "a uniquely ***federal*** remedy" (*Mitchum v. Foster*, 407 U.S. 225, 239 (1972)) with "broad and sweeping protection" (*Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (quotation marks omitted)) "read against the background of tort liability that makes a man responsible for the natural consequences of his actions" (*Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)) so that individuals in a wide variety of factual situations are able to obtain a ***federal*** remedy when their ***federally*** protected rights are abridged. See *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

While read against the general common law tort background, "[t]he coverage of [§ 1983] is . . . broader " (*Kalina v. Fletcher*, 522 U.S. 118 (1997)), and must be broadly and liberally construed to achieve its goals. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

In other words, the purpose of Congress "is the ultimate touchstone" of any preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quotation marks omitted). Anything "incompatible with the compensatory goals of the federal legislation . . ." cannot stand. *Felder*, 487 U.S. at 143. The question, in other words, is whether state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1971). Allowing states to erect any obstacles to federal court access violates this precept.

A state law, regardless of its intent, cannot "thwart the congressional remedy" or subvert Congress' clear goals in following its mandate to enforce the rights created and protected by the 14th Amendment. *Felder*, 487 U.S. at 139 (citing *Martinez v. California*, 444 U.S. 277, 284 (1980)). The courts have not hesitated to strike down state policies that do so. See *Haywood*, 556 U.S. at 739 ("A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear"); *Felder*, 487 U.S. at 153 (striking down state notice of claim statute). That is why the Court warned expressly that the rights of property owners need to be protected by the judiciary against the "cleverness and imagination" of state government word games. *Nollan v. California Coastal Commn.*, 483 U.S. 825, 841 (1987).

IV.

STATE COURTS POSSESS NO MAGICAL ABILITY TO APPLY LOCAL LAW THAT ALLOWS THEM TO EVADE FEDERAL COURT PROTECTION OF FEDERAL RIGHTS

Regulatory takings are the only constitutional rights subjected to a *Williamson County*-like ripening. That property owners have been singled out is clear.[7] As one commentator concluded, "[t]he state compensation portion of [*Williamson County*] finds no parallel in the ripeness cases from other areas of the law."[8]

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[7] See, e.g., Daniel R. Mandelker, *Land Use Law*, § 2.24 at 2-32 (5th ed. 2003) ("The Supreme Court has adopted a special set of ripeness rules to determine whether federal courts can hear land use cases."); John Delaney & Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse*, 31 Urb. Law. 195, 196 (1999) ("the ripeness and abstention doctrines have uniquely denied property owners, unlike the bearers of other constitutional rights, access to the federal courts on their federal claims").

No parallel, indeed.

There are two possible bases on which such discrimination might rest. First, as property law is generally based on the customs and practices of localities, it might be thought that the courts that are closest to the action would be more familiar with and thus better able to apply the law. Second, some misguided aspect of federalism might create the belief that each state should be responsible for its own law. Neither holds water.

First, and somewhat paradoxically in light of this theory, federal court protection is routinely provided in *some* land use cases — but only those involving aspects of the Bill of Rights *other than* the 5th Amendment's Just Compensation Clause. Federal court 1st Amendment cases abound, for example, in which the validity of local land use ordinances regulating or zoning for (or against) sexually explicit work has been challenged.[9] There is no requirement of first presenting the issues to state courts, even though they implicate the same zoning policies and land use ordinances as do other land use cases — and, indeed, as does any regulatory taking case. Cases are thus decided in federal court, based on local "community standards," without initial state court suits.[10] But state court judges do not have a monopoly on measuring the works against those local standards.

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[8] Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 (1995).

[9] E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

Nor have federal judges shown any hesitation to embroil themselves in local issues invoking the kind of neighborhood and family values typically involved in regulatory taking cases. In a celebrated zoning case, this Court concluded that:

> [a] quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

The Court of Appeals in that case had "start[ed] by examin[ing]" the zoning ordinance with reference to "the interest of the local community in the protection and maintenance of the prevailing traditional family pattern . . . ." *Boraas v. Village of Belle Terre*, 476 F.2d 806, 815 (2d Cir. 1973).

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[10] Similarly, whether an artistic or literary work is obscene under the 1st Amendment is determined by "contemporary community standards" and "applicable state law." Miller v. California, 413 U.S. 15, 24 (1973).

Even after *Williamson County*, federal courts have relied on *Belle Terre* as authority for measuring zoning laws against the blessings of wide yards and peaceful neighborhoods, with no concern that they should not be adjudicating issues of state law. See, e.g., *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 135 (3d Cir. 2002). If it is acceptable for federal courts to examine such intensely local and personal issues in the context of zoning validity and proposed development, it cannot become unacceptable when a landowner wants to challenge regulatory restrictions on constitutional grounds.

First Amendment cases dealing with the land use aspects of establishment of religion are also litigated in federal courts in the first instance, even though they all involve intensely local issues.[11]

As this Court itself has noted, federal courts routinely review issues involving exercise of a state's sovereign prerogative, including the power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue bonds without a referendum, and a host of others.[12]

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[11] E.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994).

Many of the cited cases deal with parallel features of the Bill of Rights, notably the Due Process Clause, routinely protected in federal court through 42 U.S.C. § 1983—even against unconstitutional land use regulations. All sorts of local governmental issues are litigated in federal courts every day. And they involve all aspects of the Bill of Rights—except the 5th Amendment's Just Compensation Clause.

Equally important, this Court itself has already recognized that federal regulatory taking cases can be tried in federal court *without first being tried in state court.* In *City of Chicago v. International College of Surgeons,* 522 U.S. 156 (1997), the property owner filed suit in state court, as instructed by *Williamson County.* But the city was not satisfied with that venue and, invoking 28 U.S.C. § 1441(a), removed the case to federal court before any substantive proceedings could be had in state court under state law and the Court upheld removal. 522 U.S. at 174. Thus, the state law issues remained unresolved at either the time the matter was removed or this Court affirmed the removal. In other words, the Court saw nothing untoward in trying the case in federal court, with no proceedings in state court under state law to guide the way.[13]

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[12] *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 191-92 (1959) (collecting cases) (retaining federal court jurisdiction over a state eminent domain case).

There is nothing so special about regulatory taking cases as to insulate them from federal court review.

Second, there is nothing so endemic to the concept of federalism to stand in the way of protecting basic aspects of the Bill of Rights. Indeed, in ***Felder***, the Court was told that it should rule in the government's favor out of some respect for "equitable federalism," i.e., a belief that states needed to retain some measure of control over their own litigation. ***Felder*** rejected the idea, concluding strongly that "it has no place under our Supremacy Clause analysis." 487 U.S. at 150.

In other words, Section 1983, being a federal statute of uncommon strength, adopted by Congress for the specific purpose of restricting the ability of state and local government officials to impose on the rights of ordinary citizens, had to prevail. 487 U.S. at 153.

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[13] The Eighth Circuit later tried to reconcile *Williamson County* and *City of Chicago*, but found the outcome "anomalous." *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2002). The Eighth Circuit concluded that how to resolve the resulting conundrum "is for the Supreme Court to say, not us." *Ibid.* Presumably, the Court understood that need when it granted certiorari here.

Williamson County's ripeness rule that has, for more than three decades, diverted legitimate constitutional claims away from the federal court system has no basis in history or precedent or constitutional exegesis.

CONCLUSION

Precedents are not cast away lightly. *Williamson County*, however, has not stood the test of time. For more than three decades, the judiciary has been hamstrung in its ability to properly adjudicate federal takings claims because of *Williamson County*. Lower federal courts have expressed frustration at their inability to adjudicate federal takings claims after *Williamson County*, with descriptions running the gamut from "odd" and "unfortunate" (*Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1306 n.5, 1307 n.8 (11th Cir. 1992)) to "draconian" (*Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995)), with one concluding that the situation presents "a Catch-22 for takings plaintiffs" (*Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118,127 (2d Cir. 2003)), and another describing the plaintiff as having "already passed through procedural purgatory and wended its way to procedural hell." *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283-84 (4th Cir. 1998).

It is time for the Court to eliminate the "ripeness" component of *Williamson County* that mandates seeking compensation for a regulatory taking in state court under state law before seeking federal constitutional relief in federal court.

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No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,
v.
TOWNSHIP OF SCOTT, PENNSYLVANIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Justice and Freedom Fund ("JFF"), as *amicus curiae*, respectfully urges this Court to reverse the decision of the Third Circuit.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) has created a nightmarish maze that traps takings claimants and ultimately slams the federal courthouse door in their faces. In navigating the complex interplay among procedural rules—including removal, res judicata, and collateral estoppel—the befuddled claimant is like a dog chasing its own tail but never catching it. Meanwhile the ripened claim, like a rotten tomato, falls to the ground.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

The Township of Scott has passed an Ordinance that imposes crushing financial burdens on Petitioner no matter how she responds. Ordinance 12-12-20-001 (Dec. 20, 2012). She has three choices—none of them good and all of them expensive. If she does nothing and fails to comply, the Township will impose draconian fines in addition to attorney fees and costs associated with an enforcement action. These fines range from $300 to $600 *per day*, plus attorney fees and other court costs. *Knick v. Township of Scott, Pa.*, 862 F.3d 310, 315 (3d Cir. 2017). If instead Petitioner elects to comply with the Ordinance, she must foot the bill to improve and maintain her property to ensure public access, and she must sacrifice her privacy by allowing strangers to enter her property at any time during daylight hours. Ordinance 12-12-20-001 § 5. The third and final option is litigation, but that choice entails significant time and cost (e.g., attorneys, appraisers) with no guarantee she will prevail and/or recover any portion of her expense from the Township, particularly in light of *Williamson County*'s mandate that she exhaust her options in state court first, and only then—maybe—set foot in federal court.

The procedures available for obtaining just compensation are "[un]reasonable, [un]certain, and [in]adequate[]." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974). The government unreasonably imposes the entire burden on Petitioner to initiate an inverse condemnation action *after* the government has confiscated her property. The many burdens on the landowner are only exceeded by the uncertainty that an award of compensation will be adequate to cover them—improvements to ensure public access, perhaps a fence and signage to identify the "cemetery" boundary lines, ongoing maintenance, repairs, insurance, and real estate taxes—not to mention the threat to property value. In addition to financial burdens, a property owner may find it difficult to discern whether an individual is a bona fide cemetery visitor or an intruder intending to do harm.

These overwhelming burdens should be enough to doom the Ordinance and *Williamson County*'s ripeness doctrine. But there is more. *Williamson County*'s procedural trap virtually guarantees that takings claimants will be shut out of federal court, contrary to congressional intent to provide a federal forum to vindicate claims that a state or local government has infringed rights under the federal constitution. Courts have honored this principle in cases involving other portions of the Bill of Rights—e.g., the First, Fourth, and Fourteenth Amendments—while Fifth Amendment takings claimants are forced to litigate in state court. Property owners' lack of access to federal courts encourages local governments to be aggressive, resulting in unconstitutional regulatory action. *Williamson County* has created an unwarranted inequality that has no basis in law or logic: It is *solely* Fifth Amendment property rights that are demoted to an inexplicable inferior status. This unfortunate precedent deserves to be buried in Knick's cemetery.

ARGUMENT

I. THE ORDINANCE—ON ITS FACE—UNQUESTIONABLY CONSTITUTES A "TAKING" OF PETITIONER'S PROPERTY.

The Township's public access mandate, removing Petitioner's right to exclude others from her property, "is perhaps the most serious form of invasion . . . taking not mere a single strand from the bundle of property rights . . . [but] chop[ping] through the bundle, taking a slice of every thread." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (internal citations and quotation marks omitted). The Township has "by *ipse dixit*" recast Petitioner's private property as public property; this action is "the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 164 (1980) (a "taking" occurred when the government retained the interest earned on funds deposited with it).

To complicate the analysis, courts have used the term "facial" for two distinct types of taking. In some cases, "the enactment of a challenged law inherently constitutes a taking of property." Timothy Sandefur, *Article: The Timing of Facial Challenges*, 43 Akron L. Rev. 51, 62 (2010). Under other circumstances, an oppressive law is "void on its face." *Id.* at 61. In the first instance, the remedy is compensation, but in the second, invalidation. This case potentially fits either mold. On its face, the Ordinance creates a public easement in Petitioner's land (Section A) requiring "just compensation" (Section B) but it simultaneously imposes draconian burdens on her privacy and finances sufficient to warrant invalidity (Section C). Either way, there is indisputably a Fifth Amendment "taking" that is ripe for review—just like any other constitutional infringement.

A. The "mere enactment" of the Ordinance is a "taking" of Petitioner's property that mandates "just compensation."

Two relevant provisions of the Ordinance set off constitutional alarms. The "inspection" provision creates the right for public officials to enter private property at any time to determine the existence and location of burial sites. ***Knick***, 862 F.3d at 315. Ordinance 12-12-20-001 § 6. No prior notice to the owner is required, even though the property may be a private residence. If the land contains burial sites, the "public access" provision requires the owner to make that portion of the property "open and accessible to the general public during daylight hours." Ordinance 12-12-20-001 § 5. Both provisions set off constitutional alarms, but only the "public access" mandate is before this Court.

At the very least, even if the Ordinance is a valid exercise of police power, "just compensation" must be paid. This permanent physical invasion of Petitioner's land is *per se* a Fifth Amendment taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). This would be true even if the invasion "occup[ied] only relatively insubstantial amounts of space and d[id] not seriously interfere with [Petitioner's] use of the rest of [her] land." *Loretto*, 458 U.S. at 430. Here, the Ordinance imposes ongoing burdens and intrudes daily on Petitioner's privacy. This physical invasion extends far beyond "a regulation that merely restricts the use of property" (*id.*) or "some public program adjusting the benefits and burdens of economic life to promote the common good" (*Lingle*, 544 U.S. at 538) and is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner" (*id.*).

This Court has long recognized that a "public access" mandate, granting the public "a permanent and continuous right to pass to and fro," constitutes a Fifth Amendment taking. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 (1987). The Township inflicts "a special kind of injury" by requiring Petitioner to allow "*stranger[s]* [to] directly invade[] and occup[y] [her] property." *Loretto*, 458 U.S. at 436. *See Nollan*, 483 U.S. at 831 ("[h]ad California required the Nollans to make an easement across their beachfront available to the public on a permanent basis. . .no doubt there would have been a taking"); *Dolan v. Tigard*, 512 U.S. 374, 384 (1994) ("had the city simply required petitioner to dedicate a strip of land. . .for public use. . .a taking would have occurred"); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (public right of access to privately improved pond). These cases all implicate interference with an owner's the right to exclude, "universally held to be a fundamental element of the property right." *Id.* at 180. In *Kaiser*, the plaintiffs had voluntarily modified their property, but "just compensation" was required before the government could demand public access. In Knick's case, the constitutional injury is even more glaring because the burial sites have been on her property for decades and she was not even aware of them. The government's mandatory interference with the right to exclude is a factor that distinguishes these cases from regulations that do not constitute a taking, e.g., *Yee v.*

City of Escondido, 503 U.S. 519, 527 (1992) (mobile home rent control ordinance); *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (FCC review of rents charged for utility pole space).

B. The Ordinance violates the Takings Clause by disturbing Petitioner's occupancy without adequate provision for just compensation.

The Takings Clause is not "a mere remedy." *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1409 (2016) (Thomas, J., dissenting from denial of certiorari). It is not an afterthought, allowing the government to run roughshod over private property rights, violating the Fifth Amendment and leaving the distraught landowner with the task of initiating litigation. Instead, it "places a condition" on the government's exercise of power to take private property in. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 314 (1987). Regardless of whether the government takes possession of "an entire parcel or merely a part thereof," as in this case, "it has a categorical duty to compensate" the landowner. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). This principle dates back to an early holding of this Court that the government must compensate the owner of private property it uses in a manner that inflicts "irreparable and permanent injury to any extent." *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-178 (1871).

Williamson County refers back to early precedent suggesting that provisions for obtaining compensation need only be "reasonable, certain, and adequate" at the time of the taking. *Williamson County*, 473 U.S. at 194, citing *Regional Rail*, 419 U.S. at 124-125 (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)). *Cherokee Nation* merits a closer look. The Constitution "does not provide or require that compensation shall be *actually paid in advance* of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation *before his occupancy is disturbed*." *Id.* (emphasis added). The provisions at issue in *Cherokee Nation* met this standard because there was a detailed scheme for payment of compensation, and if the landowner appealed, an amount equal to double the award had to be paid to the court and held until the matter was resolved. *Id.* at 643-646. Land was taken in *Cherokee Nation* to construct a railroad, but construction could not commence until "full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway." *Id.* at 644. In contrast to this carefully drafted statutory protection for property owners, the Ordinance disturbed occupancy the moment it was passed, as evidenced by the violation notices Petitioner received. Thus, "[i]n effect, *Williamson County* forces a property owner to shoulder the burden of securing compensation *after* the local government effects a taking." *Arrigoni*, 136 S. Ct. at 1409 (Thomas, J., dissenting from denial of certiorari).

In *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 337 (2005), Justice Rehnquist expressed reservations about requiring takings claimants "to utilize all *state* compensation procedures before they can bring a *federal* takings claim." *Id.* at 349 (Rehnquist, J., concurring) (emphasis added). To support its *state* court exhaustion prong, *Williamson County* cites two cases that have nothing to do with *state* procedures for just compensation—reasonable or otherwise. Instead, both involve exhaustion of *federal* statutory remedies. In *Regional Rail*, 419 U.S. at 124-125, this Court found that the Tucker Act, 28 § U.S.C. 1491, provided adequate procedures to compensate the railroads, and Congress did not withdraw that Act's grant of jurisdiction when it enacted the Regional Railroad Reorganization Act, 45 U.S.C.S. §§ 701 et seq., to reorganize railroads into a single viable system operated by a private for-profit corporation set up by the government. Similarly, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), a case holding that trade secrets are protectable property under the Takings Clause, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq., did not withdraw the availability of Tucker Act remedies, but required litigants to exhaust the statutory procedures available under *federal* law. Yet *Williamson County* cites both of these cases as support for its requirement to exhaust *state* court remedies before pursuing a *federal* takings claim in *federal* court. *Williamson County*, 473 U.S. at 194. The logic here is not apparent.

Williamson County does another end-run around the Constitution when it asserts that the state court exhaustion requirement "is analogous to th[is] Court's holding in *Parratt v. Taylor*, 451 U.S. 527 (1981)." *Williamson County*, 473 U.S. at 195.[2] This purported analogy is flawed. In *Parratt*, an inmate sued for violation of due process when state prison officials negligently failed to deliver hobby materials he had ordered by mail. Mere deprivation of property was not a constitutional violation per se—there had to be a lack of due process, and adequate post-deprivation remedies were available in this situation. What *Williamson County* overlooks is *Parratt*'s caution that ordinarily "pre-deprivation notice and hearing . . . serve as a check on the possibility that a wrongful deprivation would occur" (citing cases, including *Fuentes v. Shevin*, 407 U.S. 67 (1972) (striking down prejudgment replevin statute)). *Parratt*, 451 U.S. at 538. *Post*-deprivation procedures may suffice in cases where quick state action is necessary or where meaningful pre-deprivation process is impossible or impractical. *Id.* at 539; *see, e.g.*, *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure and destruction of unwholesome food to protect public health); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure and destruction of drugs). It is obviously impractical to provide *pre*-deprivation process for an official's unforeseeable carelessness in delivering prison mail. But there is no immediate need for state action with respect to burial sites that have been in places for decades, and it is neither impossible nor impractical to provide an orderly procedure before the government confiscates an interest in real property.

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[2] *Daniels v. Williams*, 474 U.S. 327, 330-331 (1986) overruled *Parratt* to the extent *Parratt* held that a state official's mere lack of care deprives an individual of life, liberty, or property under the Fourteenth Amendment.

C. The Ordinance is so oppressive that the Township should have been required to exercise the power of eminent domain.

There is "a point at which the police power ceases and leaves only that of eminent domain." *Block v. Hirsh*, 256 U.S. 135, 156 (1921); *see also Martin v. District of Columbia*, 205 U.S. 135, 139 (1907) ("constitutional rights . . . are matters of degree"). The Ordinance compels Petitioner "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The massive potential burden is limited only by the imagination. The Ordinance prohibits charging a fee for access, so the entire financial burden falls on the landowner, beginning with litigation and other costs associated with seeking compensation from the Township. The requirement that aggrieved property owners file inverse condemnation proceedings *after* their occupancy has been disturbed is only the beginning. There are likely costs associated with clearing a path or roadway to make the "cemetery" accessible. The owner may need to construct a fence, and perhaps one or more signs, to identify the location of the graves. If a visitor is injured, the landowner is vulnerable to litigation and must bear the ongoing costs of insurance, repairs, and maintenance. The landowner must pay real property tax on the entire property, including the portion now dedicated to public use.

This case stands in contrast to this Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), holding that New York City's historic landmark designation law did not constitute a taking.

Penn Central, unlike this case, did not implicate a "public access" obligation or other physical invasion. But as Justice Rehnquist observed in dissent, the landowner would likely discover that "the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation." *Id.* at 139 (Rehnquist, J., dissenting). In this case, Petitioner suffers a daily, permanent physical invasion of occupancy coupled with ongoing and unpredictable financial burdens.

Williamson County acknowledges the possibility that the government's desired result may be "so unduly oppressive" that it can only be accomplished through eminent domain, but the question was "not properly presented" and therefore "must be left for another day." *Williamson County*, 473 U.S. at 185. That day has now come. The Ordinance here is "unduly oppressive." The "cemetery" portion of Knick's property, which she must open and maintain for daily public access, has now become *public* property. The macabre result of this legislative transformation is that the only time her "private cemetery" is actually *private* is during nighttime hours!

D. *Williamson County*'s exhaustion requirement has created a tangled web that ensnares aggrieved landowners and allows the government to evade its Fifth Amendment responsibility to compensate them.

The state court exhaustion requirement created by *Williamson County* dicta has facilitated gamesmanship where Fifth Amendment claims are bounced like rubber balls between state and federal courts, ultimately tossing the aggrieved landowner out of the game. This expulsion upends the federal forum Congress intended to preserve for 42 U.S.C.S. § 1983 litigants. In a key ruling confirming the *absence* of a state exhaustion requirement for § 1983 litigants, this Court anticipated the type of entanglements *Williamson County* has spawned, including res judicata, collateral estoppel, and availability of interim relief. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 514 (1982). In *Patsy*, this Court observed that the "difficult questions concerning the design and scope of an exhaustion requirement" could be addressed efficiently by legislation but "if answered incrementally by the judiciary," the result would be "costly, remedy-delaying, and court-burdening litigation." *Id.* at 513-514. That is precisely what has happened—here and in numerous other cases.

Property owners asserting takings claims are faced with an unjustifiable dilemma. When seeking a remedy in a state court, they face the threat that government defendants will remove the action to federal court, where their claims can be dismissed because the state litigation was aborted. Even when a landowner abides by the *Williamson County* requisite and seeks judicial review at the state level, if the state court result is unfavorable, federal courts are still unavailable due to the quagmire of procedural barriers created by *Williamson County*. This is exactly what happened to Knick when she challenged the Ordinance in state court as a violation of her property rights. After that court refused to provide a forum for her suit she turned to the federal court for redress but was told that her complaint could not be heard because of the requirement that she must sue in state court—the very forum where Knick had begun her quest for justice.

In short, *Williamson County*'s ripeness doctrine "creates a class of constitutional pariahs who may never litigate their federal constitutional claims in federal court." Berger, Michael M., *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 127 (2000).

II. *WILLIAMSON COUNTY'S* SECOND PRONG CONFLICTS WITH DECADES OF THIS COURT'S PRECEDENT AND RENDERS THE TAKINGS CLAUSE INFERIOR TO OTHER PROVISIONS IN THE BILL OF RIGHTS.

This Court has jurisdiction and the aggrieved landowner has Article III standing as soon as the government has taken private property without paying for it. *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 n. 6 (2013). At this point there is a "case" or "controversy" regardless of "whether an alternate remedy exists." *Id.* In *Horne*, this Court recognized that the "prudential ripeness" requirement, wherein "the Government has both taken property *and* denied just compensation," "is not, strictly speaking, jurisdictional." *Id.* at 526; *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729, and n. 10 (2010). This Court has also repeatedly affirmed that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (internal citations and quotation marks omitted).

There is no reason to require Petitioner to waste resources on an inverse condemnation action under Pennsylvania state law before presenting her claim in federal court. The moment the Ordinance became law, the constitutional violation was complete, as evidenced by the two Notices of Violation she received. Petitioner has the same right to proceed as any other person deprived of rights under the U.S. Constitution.

A. Congressional intent to guarantee a federal forum for the vindication of federal constitutional rights is evident in § 1983 and predecessor statutes dating back to the Civil Rights Act of 1871.

Williamson County's state exhaustion prong undermines the fundamental principles behind 42 U.S.C. § 1983. The federal government's role as "a guarantor of the basic federal rights of individuals against incursions by state power" was firmly established during the post-Civil War era when Congress enacted the Civil Rights Act of 1871, the predecessor to 42 U.S.C. § 1983. ***Patsy***, 457 U.S. at 503. "Section 1983 opened the federal courts to private citizens, offering them a uniquely *federal* remedy" when states trampled their rights under the U.S. Constitution. ***Mitchum v. Foster***, 407 U.S. 225, 239 (1972) (emphasis added). This early civil rights legislation was enacted not only for those who were previously enslaved, "but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." *Id.* at 239 n. 30, quoting Representative Shellabarger, Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871). The "very purpose of § 1983" was to protect the people from *state* intrusions on their *federal* constitutional rights. *Mitchum*, 407 U.S. at 242, quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880). "*Williamson County* stands this doctrine on its head by asserting that state courts not only *may* . . . but indeed *must* be interposed" between the people and the federal courts charged with guarding their rights. Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 126-127.

A judicially crafted exhaustion requirement is irreconcilable with this time-honored role of the federal courts. This Court has repeatedly confirmed that exhaustion of state remedies is not a prerequisite to filing a § 1983 action. The issue was squarely presented—and exhaustion unequivocally rejected—in *Patsy*, 457 U.S. at 498. Even before *Patsy*, this Court already had, on "numerous occasions . . . rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies" (*id.* at 500), "recognizing the paramount role Congress has assigned to the federal courts" (*Steffel v. Thompson*, 415 U.S. 452, 472-473 (1974)). The availability of state relief is irrelevant, because "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (overruled in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1977) insofar as it held that local governments are wholly immune from suit). This conclusion is bolstered by the inclusion of a limited exhaustion requirement in the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, for adult prisoners filing § 1983 actions. *See* 42 U.S.C.

§ 1997e. "A judicially imposed exhaustion requirement . . . would usurp policy judgments that Congress has reserved for itself." *Patsy*, 457 U.S. at 508.

Moreover, if Takings Clause plaintiffs are left "at the mercy of state courts," then these courts "get to define the contours of federal law and are *de facto* free to trump the federal courts' interpretation of federal law." Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 128. This scenario "makes hash out of the federal supremacy clause" (U.S. Const., Art. VI, § 2). *Id.* *Williamson County* allows state courts to deny access to the federal judiciary to vindicate federal rights—precisely the result § 1983 was enacted to avoid. *Id.*

B. The state exhaustion requirement creates an unwarranted inequality between the Fifth Amendment and parallel provisions of the Bill of Rights.

Williamson County has contributed to the creation of "a legal regime of invidiously unequal treatment of people in their capacity as property owners, particularly—and perversely—when the government seeks to take their property from them." Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 Loy. L.A. L. Rev. 1065, 1067 (2007). As this Court recognized decades ago, "the dichotomy between personal liberties and property rights is a false one." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). The right to property, whether a welfare check or real estate, is no less "personal" than the right to speak or travel. "Congress recognized these rights in 1871 when it enacted the predecessor of §§ 1983 and 1343 (3)." *Id.* It is people who have the right to enjoy property—property itself does not have rights.

Commentators have noticed the growing inequality over the years. Crocker, Katherine Mims, *Justifying a Prudential Solution to the* Williamson County *Ripeness Puzzle*, 49 Ga. L. Rev. 163, 205 (2014) ("There is little reason to believe that the Takings Clause should be an outlier among these basic liberties—or that the Supreme Court meant to make it one.") Kanner, *[Un]equal Justice*, 40 Loy. L.A. L. Rev. at 1070 (federal courts "stand ever ready to adjudicate . . . local controversies over regulations of land" when federal constitutional rights *other than* the Takings Clause are infringed). Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. at 62-63 (noting inequalities between facial takings challenges and other facial challenges in computing the statute of limitations); Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 124 n. 104 ("Why should one facial invalidity under the Bill of Rights be shielded by limitations, but not the other?").[3] Even convicted criminals sometimes receive relief in federal court without exhausting state court post-conviction remedies. Kanner, *[Un]equal Justice*, 40 Loy. L.A. L. Rev. at 1078.

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[3] This commentator cites *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1160 (4th Cir. 1991), where the Fourth Circuit dismissed the Fifth Amendment claim as barred by the statute of limitations—but not the First Amendment claims. Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 124 n. 105.

In short, the Takings Clause, "as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment," has unquestionably been "relegated to the status of a poor relation." *Dolan*, 512 U.S. at 392; *Arrigoni Enters.*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari). This Court should correct the inequality by eliminating the second prong of *Williamson County*'s ripeness doctrine.

C. Federal courts routinely adjudicate violations of other constitutional rights, including those that implicate land use, with no state exhaustion requirement.

The inferior status of Takings Clause claims is inexplicable. "[This] Court has not explained why . . . we should hand authority over federal takings claims to state courts, . . . while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment, . . . or the Equal Protection Clause. . . ." *San Remo Hotel,* 545 U.S. at 350-351 (Rehnquist, C.J., concurring). "Federal court protection is . . . routinely provided in land use cases involving other aspects of the Bill of Rights." Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 124. These cases typically do not even mention a state court exhaustion requirement:

- First Amendment - Establishment Clause: *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (schools and churches granted "veto" power to prevent issuance of liquor licenses within 500 feet of their properties).

- First Amendment - Free Expression and Religion: *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (adult theatre); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (adult establishment); *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) (nude dancing); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (church building permit); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (church inspection and zoning approval).

- First Amendment - Signage Restrictions: *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (municipal sign code); *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996) (on-site and off-site sign restrictions); *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380 (3d Cir. 2010) (building signs); *Brown v. Town of Cary*, 706 F.3d 284 (4th Cir. 2013) (sign restrictions on private residence).

- Fourteenth Amendment - Equal Protection Clause: *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (group home); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (single family homes).

The result is the same in contexts not involving land use. Federal courts conform to congressional intent to provide a federal forum for § 1983 actions, either openly rejecting or declining to mention any obligation to file in state court first. For example:

- First Amendment - Establishment Clause (public schools): *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence); *Abingdon School*

Dist. v. Schemp, 374 U.S. 203 (1963) (Bible reading).

- Fourth Amendment – Search Warrant: *Monroe v. Pape*, 365 U.S. at 183 ("It is no answer that the State has a law which if enforced would give relief.")
- Fourteenth Amendment – Racial Discrimination in Education: *McNeese v. Bd. of Educ.*, 373 U.S. 668, 671 (1963) ("[R]elief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy.")

These cases, challenging state and local laws that implicate "parallel features of the Bill of Rights," are commonly initiated in federal court and the rights at issue are "routinely protected" there through 42 U.S.C. § 1983. Berger, *Supreme Bait & Switch*, 3 Wash. U. J.L. & Pol'y at 125. "*Why are property owners required to go first to state court in order to ripen their federal taking claims*?" *Id.* (emphasis added). As Justice Rehnquist observed, many of these cases involve land use. Some cases do have their genesis in state court but come to this Court on appeal. Plaintiffs have a choice as they begin their journey for justice; they may select either a federal or a state forum to initiate the action. When cases come before this Court from state supreme courts, it is not because they were denied a federal forum but because they chose to file in state court. *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (billboards) (California Supreme Court); *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992) (cross burning) (Minnesota Supreme Court).

CONCLUSION

This Court should reverse the Third Circuit ruling against Petitioner and eliminate the procedural nightmare created by the second prong of *Williamson County*'s ripeness requirement.

Respectfully submitted,

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No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,
v.
TOWNSHIP OF SCOTT, PENNSYLVANIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF CONGRESSMAN STEVE KING, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION & CIVIL JUSTICE, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES; AND CONGRESSMAN KEVIN CRAMER, IN SUPPORT OF PETITIONER

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BRIEF OF THE HONORABLE STEVE KING AND THE HONORABLE KEVIN CRAMER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER ROSE MARY KNICK

The Honorable Steve King, Chairman, Subcommittee on the Constitution & Civil Justice, Committee on the Judiciary, U.S. House of Representatives, and the Honorable Kevin Cramer, have received the consent of the parties to file this brief as *amici curiae* through letters of consent filed with the Clerk of the Court.[1]

INTEREST OF *AMICI CURIAE*

The jurisdiction of the House Subcommittee on the Constitution & Civil Justice includes the constitutional protection of private property rights. It is with an appreciation of the gravity of this appeal that Chairman King and Congressman Cramer submit this brief to respectfully urge the Court to reverse the decision of the Third Circuit in a manner that will restore the right of property owners to have Fifth Amendment taking claims adjudicated on the merits in the federal courts. The Subcommittee determined several years ago that this right is being severely restricted if not extinguished by the current application of the so-called "state court requirement" of this Court's

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Blanket consents by both parties are on file with the Court.

1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172.

SUMMARY OF ARGUMENT

At various times during the past twenty years, the Subcommittee on the Constitution and Civil Justice of the Judiciary Committee of the U.S. House of Representatives has inquired into the impact of this Court's requirement, formulated in 1985 in *Williamson County*, that property owners must pursue taking claims in State court before their Fifth Amendment taking claims may be adjudicated by a federal court. Subcommittee members have repeatedly expressed concern that *Williamson County* has consistently denied property owners the ability to have a federal court determine the merits of a Fifth Amendment taking claim. In 2000, the Subcommittee and the House of Representatives passed H.R. 2372, the Private Property Rights Implementation Act of 2000, in order to "simplify and expedite access to the federal courts," but without altering substantive Fifth Amendment takings claim standards. In 2005, the Subcommittee, the Hon. Steve Chabot, Chair, submitted an amicus brief in support of the petitioners in *San Remo Hotel, L.P. et al. v. City and County of San Francisco*, 545 U.S. 323 (2005), urging overruling of *Williamson County*'s state court litigation requirement. In more recent years, members of Congress have continued to express concern that *Williamson County* is restricting and obstructing private property rights, proposing the Private Property Rights Implementation Act of 2006 (H.R. 4772), and the Property Owners Access to Court Act of 2010 (H.R. 5624), each of which proposed a procedural fix to the *Williamson County* state court requirement. In addition, this Court's ruling in *Kelo v. New London*, 545 U.S. 469 (2005), allowing the use of eminent domain in aid of private economic development, has exacerbated concerns among these *amici curiae* regarding the treatment of property owners by the federal courts.

The *amici curiae* in the instant case respectfully submit that this Court should resolve the current conflict among the federal courts regarding access to the federal courts in a manner that eliminates or at least mitigates the obstacles that have resulted from *Williamson County,* and provides guidance to Congress regarding the Supreme Court's understanding of the current scope of property rights protection.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICTING INTERPRETATIONS OF *WILLIAMSON COUNTY* IN A MANNER THAT RESTORES THE RIGHT OF PROPERTY OWNERS TO PURSUE TAKING CLAIMS IN FEDERAL COURT, AND PROVIDES CONGRESS WITH GREATER GUIDANCE REGARDING CONSTITUTIONAL PROTECTIONS OF PROPERTY RIGHTS.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court wrote: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner *cannot* claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." 473 U.S. at 195 (emphasis added). This Court did not say that the federal taking claim co-existed from the outset with the state claim, or that the plaintiffs in *Williamson County* were simply in the wrong forum. Rather, the Court held that a property owner *cannot* bring a federal taking claim until that claim has been litigated in state court and just compensation has been denied. In 1999, this Court reaffirmed this interpretation, holding in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999), that a Fifth Amendment taking claim "does not accrue" until state law and procedures have been utilized.

Williamson County, however, has caused a crisis in procedural takings law, because federal judges have interpreted it so as to avoid addressing the merits of federal takings claims. From 1997 to 2000, the Subcommittee conducted an inquiry into the impact of *Williamson County* on the rights of property owners under the Fifth Amendment's Taking Clause. The Subcommittee was provided with credible research that in 94 percent of all takings cases litigated between 1983 and 1988,[2] and in 83 percent of the takings claims initially raised in the federal district courts from 1990 to 1998, the federal court never reached the merits of the property owner's claim of a taking without just compensation.[3] Of those property owners who could afford to appeal their cases through the state courts and then proceed in federal court, 64 percent still failed to have their claims resolved on the merits. Moreover, in that small portion of appellate cases where a federal court found a takings claim to be procedurally ripe *and* addressed the merits, it took property owners "on the average, 9.6 years to have an appellate court reach its determination."[4] And these statistics do not address the low income or middle class property owners who, in the face of the expensive procedural challenges that stand between them and a federal forum on the merits of their federal civil rights claims, are too intimidated to even start down the long road to a hearing on the merits in federal court.

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[2] *See* H.R. Rep. No. 106-518, at 10 *citing* G. Overstreet, "The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions," 10 J. Land Use & Envtl. L. 91, 92 n.3 (1994).

[3] *See ibid*, *citing* J. Delaney and D. Desiderio, "Who Will Clean Up the 'Ripeness Mess'? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse," 31 Urb. Law. 195, 202-231 (1999), at 196.

During the 106th Congress, as Chair of the House Subcommittee on the Constitution & Civil Justice, the Hon. Charles Canady was the lead sponsor of H.R. 2372,[5] the Private Property Rights Implementation Act of 2000. Among other things, H.R. 2372 was designed to address the suppression of individuals' defenses to property rights violations by clarifying and simplifying the procedures governing federal property rights claims in federal court. Most significant to this case, H.R. 2372 would have removed the requirement that property owners litigate their federal takings claims in state court first, in order to ensure that property owners like the Petitioner in this case have a meaningful opportunity to have the federal courts decide their federal takings claims. On

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[4] *Ibid.*

[5] 106th Cong. (2d. Sess. 2000).

March 16, 2000, H.R. 2372 passed the House of Representatives.

The Judiciary Committee's 2000 Report focused precisely on the consequences of *Williamson County* that underlie the instant appeal. The Report discussed the lengthy and expensive litigation required to pursue a taking claim through the state and then federal courts: for example, 14 years in *Del Monte Dunes*, and 13 years in *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994).[6] The Committee also took note of the application of claim and issue preclusion defenses to bar federal taking claims.[7] The Report concluded: "The effect of the reasoning of these cases is that many property owners end up with *no opportunity* to have their Federal constitutional claims heard in Federal court."[8]

In 2005, the case of *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), and the Second Circuit's conflicting decision in *Santini v. Connecticut Hazardous Waste Management Service,* 342 F.3d 118 (2d Cir. 2003), *cert. denied,* 73 U.S.L.W. 3211 (2004) (the undersigned counsel represented Santini), illustrated the procedural crisis that has resulted from the *Williamson County* state court requirement, and the concerns that have prompted Congressional proposals. In *Santini*, the Second Circuit in 2003 became the first federal court to address the merits of a federal taking claim – which arose from events that occurred from 1991 to 1993. Even then, the Second Circuit, in allowing Santini to proceed, and allowing Second Circuit litigants henceforth to reserve their federal claim during state court proceedings, effectively affirmed that Santini had been *properly required* to proceed through six years of state court litigation before his federal claim accrued and could even be pursued in federal court. In *San Remo*, this Court overruled the *Santini* holding, 545 U.S. at 342-43, in favor of continuing the *Williamson County* regime.

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[6] *Ibid.* at 6.

[7] *Ibid.* at 8.

[8] *Ibid.* at 9.

As noted earlier, concern among members of Congress with *Williamson County's* anomalous consequences in general and then the *San Remo* holding in particular were then further reflected by work on the Private Property Rights Implementation Act of 2006 (H.R. 4772), and the Property Owners Access to Court Act of 2010 (H.R. 5624).

Thus, both judicial decisions and legislative efforts to rectify *Williamson County* highlight the fact that its state court requirement has operated to deny property owners their rights under the Takings Claim of the Fifth Amendment. A litigant can spend years in state court trying to ripen a federal claim, and then be met with an inability to access the federal courts to pursue a federal constitutional claim once the state court litigation has terminated.

The Petition for Writ of Certiorari filed by Mrs. Knick in October 2017 amply summarizes the flaws, anomalies, and injustices that have resulted from *Williamson County*'s state court litigation requirement. The rule (1) incorrectly focuses on what a state court does with a taking claim, rather than the facts and whether the claim satisfies the substantive elements of takings jurisprudence (Pet. at 14-15); (2) is prudential, not jurisdictional, yet has caused wide confusion, conflicts, and inconsistencies for litigants and courts (Pet. at 15-17); (3) has the effect of extinguishing federal constitutional claims without a hearing on the merits (Pet. at 17); (4) is contrary to plainly expressed Congressional intent that property owners be provided a federal forum and a substantive adjudication of their federal constitutional claims (Pet. at 17-18); (5) is simply inconsistent with federal court removal procedure (Pet. at 18); and (6) presents takings claimants with a Hobson's Choice of procedural options that sometimes result in claims not being asserted at all (Pet. at 19).

Congressional concern about *Williamson County* as a procedural obstacle to the protection and vindication of private property rights has been exacerbated by the substantive curtailment of such rights represented in this Court's holding in *Kelo v. New London*, 545 U.S. 469 (2005). Though *Kelo* dealt with the constitutionally permissible purposes of so-called "direct" condemnation, while *Williamson County* deals generally with procedures for adjudicating "indirect condemnation" claims arising from excessive regulations and restrictions, it is no small matter that both cases arose from the Takings Clause of the Fifth Amendment to the U.S. Constitution, and have the effect of protecting governmental decision-making from challenges by private property owners, even though the Takings Clause is a statement of citizen rights *against* government overreaching. Put another way, the *Kelo* decision grants substantial deference to government officials who declare that the use of eminent domain to assist private economic will have public benefits, while *Williamson County* effectively shields regulatory excess from challenges brought in federal court under federal law when, for whatever reason, a state court has failed to regard the federal Taking Clause as a significant protection of private property rights. *Williamson County* and *Kelo* both exemplify what Professor Gideon Kanner has called, "The invidious disparity between treatment of constitutionally aggrieved property owners seeking judicial redress" for claims arising from the federal Takings Clause, and "persons seeking redress for other constitutional rights. . . ." G. Kanner, "[Un]equal Justice Under Law: The Invidious Disparate Treatment of American Property Owners In Takings Cases," 40 Loy. L.A. L. Rev. 1065, 1070 (2007).

The procedural confusion and unfairness of *Williamson County*, by itself and in combination with the impacts of *Kelo v. New London*, have left the scope of Fifth Amendment protection of property rights unclear and undetermined, and so have impeded Congress from examining what if any other procedural clarifications or amendments are warranted. Resolution of the conflicting interpretations of *Williamson County* will aid Congress, the Subcommittee on the Constitution and Civil Justice, and the Judiciary Committee in understanding its opportunities and obligation to protect the constitutional rights of property owners.

CONCLUSION

This Court should resolve the conflicting interpretations of the *Williamson County* state court requirement in a manner that will restore the rights of property owners to have a federal court adjudicate their Fifth Amendment taking claims and will provide guidance to Congress regarding the Supreme Court's understanding of the scope of constitutional protection of property rights.

Respectfully submitted

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June 5, 2018

No. 17-647

In The

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

On Writ of Certiorari To
The United States Court Of Appeals
For the Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should reconsider the portion of ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court. *See Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders (NAHB) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

Housing providers depend on clear regulatory and legal processes that do not infringe on constitutionally-protected property rights. This Court's decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, has had the opposite effect; not only confusing property owners but also creating chaos between the lower courts. 473 U.S. 172 (1985).

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Blanket consents by both parties are on file with the Court.

The ability of all property owners to have their constitutional claims heard predictably and transparently is vital to the interest of NAHB and its members. NAHB continues to be disturbed by the faulty rationale and application of *Williamson County*, and in particular, its expansion by the lower courts to prevent constitutional claims of all types, including takings, due process, and equal protection land use claims, from entering the federal courthouse.

SUMMARY OF ARGUMENT

It has been over three decades since this Court's *Williamson County* decision. Since then, various contours of the Fifth Amendment's substantive protections have been analyzed by this Court, but the most fundamental jurisdictional question -- "When, if ever, can a federal court hear a federal takings claim?" remains admittedly unclear. *See e.g, San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348-349 (2005) (Rehnquist, C.J., concurring) (stating that the state-litigation rule "may have been mistaken," and that "[i]t is not clear that *Williamson County* was correct in demanding" that a claimant must first seek a compensation remedy through state litigation as a prerequisite to ripen a federal takings claim).

As a result, the federal courts are in chaos on how to apply *Williamson County's* ripeness test, not only to takings claims, but also to due process and equal protection land use claims. In fact, many lower courts continue to expand *Williamson County's* state exhaustion prong to include due process and equal protection claims, thus closing the federal courthouse door for constitutional land use claims. It is of little consolation that members of this Court have recognized that *Williamson County* should not be extended to other constitutional claims. *Arrigoni Enterprises, LLC v. Town of Durham, Conn*, 136 S. Ct. 1409, 1411 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari) (noting that "[p]laintiffs alleging violations of other enumerated constitutional rights ordinarily may do so in federal court without first availing themselves of state court. But the same is not true for a Takings Clause plaintiff.").

Further, nothing in the Court's *Williamson County* decision or any other Supreme Court case suggests that a due process or equal protection claimant must exhaust state remedies prior to bringing a claim in federal court. In fact, this Court in *Lingle v. Chevron* further clarified the constitutional separation between federal due process and takings claims. 544 U.S. 528 (2005).

It is high time for this Court to acknowledge the inability of lower courts to apply *Williamson County* in a fair and uniform matter. *Williamson County's* state exhaustion prong is neither fair nor just, and prevents federal takings, due process, and equal protection claimants from seeking relief in federal court. This Court should reverse the Third Circuit's decision, and overturn *Williamson County* to clarify that federal takings, due process, and equal protection claims are ripe for federal review once the state infraction occurs.

ARGUMENT

I. LAND USE CLAIMANTS OFTEN SEEK CONSTITUTIONAL REMEDIES OTHER THAN JUST COMPENSATION

Lower courts continue to ignore fundamental differences between takings claims and non-takings claims, and require plaintiffs to exhaust state procedures for not only takings claims, but other constitutional claims. Several Circuits require property owners to exhaust state remedies to ripen substantive due process, procedural due process, or equal protection land use claims. *See, e.g., River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) (holding that property owners may not avoid *Williamson* by bringing substantive or procedural due process land use claims); *Deniz v. Mun. of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002) (holding that "no substantive due process claim will lie until [an inverse condemnation remedy] is exhausted."); *J.B., Ranch, Inc. v. Grand County*, 958 F.2d 306, 308 (10th Cir. 1992) (applying *Williamson County* to plaintiff's substantive due process claim because the facts of the case "fit squarely within the analysis developed in just compensation cases."); *Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 515 (2d Cir. 2014) (stating that *Williamson County* "has been extended to equal protection and due process claims asserted in the context of land use challenges.") (citations omitted).

This Court should rule that takings claims *and* other constitutional land use claims can go to federal court without first exhausting state procedures.

A. Government Action Against Land Use Claimants Often Implicates Substantive Due Process, Procedural Due Process, and Equal Protection Rights

A single land use fact pattern often implicates several separate constitutional guarantees. For example, one scenario could include a forced conveyance of private property to an elected official in return for a permit approval. *Forseth v. Vill. of Sussex*, 199 F.3d 363, 366 (7th Cir. 2000). Still another could include intentional delay tactics by governmental officials so egregious that land use applicants face foreclosure, and possible personal bankruptcy. *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014). These scenarios can include allegations of arbitrary government action, failure to provide adequate notice, and discriminatory conduct.

Forseth, *Sherman*, and countless other land use cases, illustrate that:

> Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, [courts] are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, [courts] examine each constitutional provision in turn.

Soldal v. Cook County, 506 U.S. 56, 70 (1992).

Thus, when faced with government action that adversely affects property, land use claimants often bring multiple constitutional claims in additional to Fifth Amendment Takings, including substantive due process, procedural due process, and equal protection. When claimants bring multiple claims, courts must undoubtedly focus on "the nature of the right assertedly threatened" rather than the "power being exercised or the specific limitation imposed" by the offending party. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). In addition to takings claims, alleged violations of due process and equal protection are often at the heart of land use cases. *See Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Importantly, the injury upon property owners for due process and equal protection violations has never been connected to just compensation.

For substantive due process, this Court states:

> [T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' As to th[is] type of claim [], the constitutional violation actionable under [Sec] 1983 is complete when the wrongful action is taken. A plaintiff, under *Monroe v. Pape*, may invoke § 1983 regardless of any state-tort remedy that might otherwise be able to compensate him for the deprivation of these rights.

Zinermon v. Burch, 494 U.S. 113, 125 (1990) (citations omitted); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (stating that the Court has "emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government'") (citations omitted).

Similarly, procedural due process violations have nothing to do with just compensation. This Court states "[i]t is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing . . ." *Carey v.*

Piphus, 435 U.S. 247, 266, *citing Fuentes v. Shevin*, 407 U.S. 67, 87 (1972). In fact, a showing of *any* injury is not necessary for procedural due process claims, let alone a government failure to provide just compensation. *Id.* (stating that "denial of procedural due process should be actionable for nominal damages without proof of actual injury.").

Finally, state infractions on equal protection rights occur at the moment the unconstitutional discrimination occurs. This Court recognizes that "[t]he purpose of the equal protection clause . . . is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statue or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citations omitted).

Clearly, in procedural due process, substantive due process, and equal protection, the focus is the wrongful action by the government, not whether the plaintiff received just compensation.

B. The Court's Takings Cases Recognize a Distinction Between Takings Claims and Other Constitutional Claims.

Even this Court's takings cases make a clear distinction between just compensation claims and other constitutional claims, such as due process and equal protection. In *Loretto v. Teleprompter Manhattan CATV Corp.*, this Court stated that "The [lower court] determined that [the state statute] serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid." 458 U.S. 419, 425 (1982).

Similarly, in *Lucas v. South Carolina Coastal Council*, a property owner brought a claim under the Takings Clause claiming that the enactment of a state statute that prohibited any development on his property constituted a taking under the Fifth Amendment. Here, the Court noted that the Petitioner "did not take issue with the validity of the [statute] as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives." 505 U.S. 1003, 1009 (1992) (emphasis added).

Additionally, the type of remedies available under just compensation compared to other constitutional claims is further evidence that courts should not apply *Williamson County* to all land use constitutional claims. This Court in *Williamson County* held that the injury in the takings context is not the taking of property; but rather the lack of just compensation for the taking. Just compensation does "not include such consequential damages as lost profits, lost opportunities, attorneys' fees, relocation costs, or loss of good will." Karena C. Anderson, *Strategic Litigating in Land Use Cases: Del Monte Dunes v. City of Monterey*, 25 Ecology L.Q. 465, 481 (1998). These are remedies for due process and equal protection violations. Under § 1983, remedies for due process and equal protection violations can include injunctive or declaratory relief, and damages. *Id.* This includes consequential and incidental damages. It makes little sense to ignore these remedial differences between just compensation claims and other constitutional claims.

Despite significant difference in remedies and injury, courts continue to ignore the important differences between land use constitutional claims. For example, the Seventh Circuit, relying on *Williamson County*, holds:

> "[A] property owner may not avoid *Williamson* by applying the label 'substantive due process' to the claim . . . [so] too with the label 'procedural due process.' Labels do not matter. A person contending that state or local regulation of the use of land has gone overboard must repair to state court."[2]

River Park, 23 F.3d at 167.

Due process and equal protection rights are not mere "labels." There are substantial, constitutionally important, and distinct differences between due process, equal protection, *and* takings claims. It is time for this Court to hold that all land use constitutional claims can be heard by federal courts without having to exhaust state procedures.

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[2] Interestingly, the court held that claimant's equal protection claim was not subject to *Williamson County*, noting that claimant's allegation of "malicious" conduct by a governmental agent was "wholly unrelated to any legitimate state objective." *Id.* at 370, 371. It is nigh impossible to decipher why the Seventh Circuit categorially applies *Williamson County* to due process claims while providing limited exceptions for equal protection.

II. THIS COURT NEVER INTENDED FOR *WILLIAMSON COUNTY'S* STATE EXHAUSTION REQUIREMENT TO SERVE AS A BLANKET RULE FOR ALL LAND USE CONSTITUTIONAL CLAIMS.

A. It is Textually Clear That *Williamson County* Should Not be Applied to Due Process and Equal Protection Claims.

Williamson County created a two-part ripeness test for *solely* as-applied regulatory takings claims. *See e.g., Kurtz* at 514 (stating that [i]n *Williamson County,* this Court "did not reach any issue of exhaustion" for any claims other than Fifth Amendment Takings); *Culebras Enterprises Corp. v. Rivera Rios,* 813 F.2d 506, 515 (1st Cir. 1987) (noting that "[w]e are aware that, in *Williamson County,* the availability of a state inverse condemnation remedy was only held to defeat plaintiff's just compensation clause claim.").

Nothing in *Williamson County* or any other Supreme Court case suggests that federal courts should require substantive due process, procedural due process, or equal protection claimants to first exhaust state remedies. Instead, the Court clarified in *Williamson County* that § 1983 claims, including due process and equal protection claims, do not have to exhaust state remedies.

This Court notes:

> [w]hile it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of the zoning and planning actions taken by county authorities . . . [a litigant] would not be required to resort to those procedures before bringing [a] [Sec] 1983 action, because those procedures are clearly remedial.

Williamson County at 193.

Further, the *Williamson County* Court went on to say that "[t]he remedy for a regulation that goes too far, under the due process theory, is not 'just compensation', but invalidation of the regulation, and if authorized and appropriate, actual damages." *Williamson County* at 197.

It is telling that even when the *Williamson County* Court analyzed the due process claim, it refused to require Respondent Hamilton Bank to exhaust state remedies, noting that the due process claim was premature *only* because "no [final] decision had been made at the time respondent filed its Sec. 1983 action." *Id.* at 200.

Further, the *Williamson County* Court's reliance on *Parratt v. Taylor* to justify the state procedures rule is misplaced. *Id.* at 195, *citing Parratt v. Taylor*, 451 U.S. 527 (1981). True, *Parratt* is a procedural due process case where the Court held that postdeprivation process provided to a prison inmate for the "random and unauthorized" act of losing the inmate's mail did not violate the Fourteenth Amendment. *Id.* at 541. However, it is difficult to see how this translates as a blanket for all land use claims, where most, if not all are "nonrandom acts for which pre-deprivation hearings are not only feasible, but actually held." J. David Breemer, *Ripeness Madness: The Expansion of Williamson County's Baseless "State Procedures" Takings Ripeness Requirement to Non-Takings Claims*, 41 Urb. Law. 615, 637 (Fall 2009).

By overturning *Williamson County's* state exhaustion prong, this Court will make clear to lower courts that *Williamson County* was never intended to require due process and equal protection land use claimants to exhaust state procedures prior to bringing the claim in federal court.

B. Despite no Precedential Basis, Courts Continue to Apply *Williamson County* to Other Constitutional Claims.

A look at how *Williamson County* is applied by the lower federal courts clearly shows the inability of our courts to create a workable set of rules for *Williamson County*. Lower courts continue to expand *Williamson County* to substantive due process and other constitutional claims, and in the process have created an indecipherable set of ripeness standards to land use claims.

An examination of the Second & Sixth Circuits exemplifies the intra-circuit chaos caused by *Williamson County*. In *Braun v. Ann Arbor Charter Twp.*, the Sixth Court recognized that it is unclear whether due process and equal protection claims must satisfy *Williamson County's* exhaustion requirements. 519 F.3d 564, 572 (6th Cir. 2008). In *Braun*, rather than resolve whether or not *Williamson County* applied to plaintiff's substantive due process or equal protection claims, the Sixth Circuit essentially bypassed *Williamson County's* ripeness analysis. Instead, the court "assumed arguendo" that plaintiff's claims were not "ancillary" to the takings claim, and dismissed the claims on alternate grounds. *Id.* at 574. It is striking that despite essentially bypassing *Williamson County* analysis in *Braun*, the Sixth Circuit continues to hold that *Williamson County* is jurisdictional. *Texas Gas Transmissions, LLC. v. Butler County Bd. Of Comm'rs*, 625 F.3d 973 (2010); *see also*, *Bigelow v. Mich. Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992) (noting that "[r]ipeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed."). It is irreconcilable for the Sixth Circuit to label *Williamson County's* ripeness rule as "jurisdictional" yet at the same time sidestep *Williamson County* as it did in *Braun*.

The Second Circuit admits, it too, is unable to apply *Williamson County* without resorting to a set of contortive exercises. *Kurtz* at 514 ("After *Williamson County*, courts have attempted to settle questions of ripeness in the several contexts of due process claims: substantive or procedural; substantive claims alleging regulatory overreach or those alleging arbitrary and capricious conduct; claims arising from the same nucleus of fact as a taking claim, or not; and regulatory or physical takings. Myriad permutations can result."). In reality, this Court has never suggested that lower courts create new standards to fit due process and equal protection claims into *Williamson County's* framework.

This Court must overturn *Williamson County's* state exhaustion requirement in order to restore a comprehensible set of ripeness rules for land use claims.

III. *LINGLE V. CHEVRON* IS THIS COURT'S CLEAREST EXPRESSION THAT DUE PROCESS AND TAKINGS CLAIMS ARE DISTINCT, YET COURTS CONTINUE TO RELY ON *WILLIAMSON COUNTY* TO SUBSUME DUE PROCESS CLAIMS.

For well over a decade, it has been clear that Fifth Amendment Takings claims are separate and distinct from due process cases. *Lingle v. Chevron*, 544 U.S. 528 (2005). In *Lingle*, the Court determined that the "substantially advances legitimate state interests [test]" was not a proper takings standard. *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *abrogated by Lingle* at 542. By eliminating the substantially advances test, the Court separated due process claims from Fifth Amendment regulatory takings claims.

In *Lingle*, this Court admitted the Agins means-ends inquiry was one that "commingl[ed] of due process and takings inquiries," and that such "reliance on due process precedents" has "no proper place in [our] takings jurisprudence." *Id.* at 529. Certainly, "[a takings] suit pursuing just compensation is entirely irrelevant to the validity of land use regulations, and has no effect on any facts relevant to [a due process] claim." Nader James Khorassani, ***Must Substantive Due Process Land Use Claims Be So "Exhaust"ing?***, 81 Fordham L. Rev. 409, 443 (Oct. 2012); ***see also, Harris v. City of Akron***, 20 F.3d 1396, 1405 (6th Cir. 1994) (substantive due process violations include " . . . official acts that are unreasonable and arbitrary and 'may not take place no matter what procedural protections accompany them' . . .") (citation omitted).

This Court was particularly concerned that the *Agins'* due process-like test "reveals nothing about the ***magnitude or character of the burden*** a particular regulation imposes on private property rights." This, the Court admitted, "is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Lingle* at 543.

Some lower federal courts have recognized that *Lingle* foreclosed the ability of federal courts to assert that all constitutional claims brought in the context of a property rights case are subsumed by the Fifth Amendment. ***See e.g., Crown Point Dev., Inc. v. City of Sun Valley***, 506 F.3d 851 (9th Cir. 2007). Prior to the ***Crown Point*** decision, the Ninth Circuit refused to allow property owners to bring due process or equal protection claims in cases involving real property. ***Armendariz v. Penman***, 75 F.3d 1311 (9th Cir. 1996); ***see also, A Helping Hand, LLC v. Baltimore County, MD.***, 515 F.3d 356, 369 n.6 (4th Cir. 2008); ***Rose Acre Farms, Inc. v. U.S.***, 559 F.3d 1260, 1277 (Fed. Cir. 2009). The *Crown Point* court, however, explained that "*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct." *Crown Point* at 855.

Unfortunately, other courts continue to apply *Williamson County's* state exhaustion rule to some or all constitutional claims in the land use context, by subsuming other constitutional claims into a takings claim. In *Deniz v. Mun. of Guaynabo*, the court refused to hear a due process claim, noting that "[d]ressing a takings claim in the raiment of a due process violation does not serve to evade the exhaustion requirement. Here as we have said, the inverse condemnation remedy represents an arguably available and adequate means of obtaining compensation for the alleged taking. Thus, no substantive due process claim will lie until that remedy is exhausted." 285 F.3d 142, 149 (1st Cir. 2002) *quoting Ochoa Realty Corp. v. Faria, et al.*, 815 F.2d 812, n.4 (1987); *see also, Downing/Salt Pond Partners, L.P. v. Rhode Island and Providence Plantations*, 643 F.3d 16, 28 (1st Cir. 2011) (noting that the court has "held that a plaintiff cannot, [evade *Williamson County*] merely by recasting its takings claim 'in the raiment of a due process violation'.") (citations omitted).

Similarly, the Seventh Circuit requires property owners to exhaust state procedures to ripen substantive due process claims in federal court. In *Forseth*, the plaintiffs attempted to develop a piece of property, but the village conditioned final approval upon a private conveyance of a buffer strip to the village board president. 199 F.3d at 366 (7th Cir. 2000). The plaintiffs conveyed the strip and subsequently brought a claim in federal district court, claiming violations of substantive due process, equal protection, and takings. *Id.* at 367. Despite recognizing the "private nature of [the government's] extorted acts" the court nevertheless applied ***Williamson County*** to the claimant's substantive due process claim because it fell "within the framework for takings claims." *Id.* at 370. This makes no sense. How can it be that a court can essentially subsume a claimant's substantive due process claim into a takings claim, despite recognizing the "troubling facts and allegations" the "significant private pecuniary gain achieved by [the village board president]" and the "questionable use of his governmental position and authority." *Id.* at 370. In fact, the Seventh Circuit's position is nearly absolute, noting that it "ha[s] yet to excuse *any* substantive due process claims[s] in the land-use context . . ." *Id.* at 369 (emphasis added).

Lingle is generally regarded as this Court's most committed expression of modern takings jurisprudence. If due process and equal protection claims are now separate from takings claims, then *Williamson County's* state exhaustion requirement should not apply to these related constitutional claims. It is baffling that ***Williamson County*** continues to throw a shadow not only over ripeness standards, but the doctrinal takings and due process standards that were settled in *Lingle*. It is for this reason that this Court must be explicit and override *Williamson County*.

CONCLUSION

"Considerations of 'fairness and justice'" lie at the heart of the Takings Clause. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002). It is neither fair nor just to allow a municipal defendant to expand *Williamson County* to foreclose a claimant's due process or equal protection claim, when there are fundamental differences between takings and other constitutional claims. Nothing in *Williamson County* or any other precedent from this Courts dictates such a result. In fact, *Lingle* should provide direction to the lower courts to treat takings distinctly from other land use constitutional claims. Despite this, courts continue to prevent land use claimants from exercising their takings, due process, and equal protection rights in federal court.

It is time for this Court to reverse the decision below, and overrule *Williamson County's* holding requiring land use plaintiffs to exhaust state procedures prior to bringing a claim in federal court.

Dated: June 5, 2018

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No. 17-647

IN THE

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA,
ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF AMICI NATIONAL GOVERNORS ASSOCIATION, ET AL. IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

State and local governments have the "important responsibilities" of "protecting the health, safety, and welfare of [their] citizens." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007). Amici are groups representing the interests of those government entities, which for over 30 years have relied on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

By requiring takings claimants to seek compensation under the state's procedure for providing it, *Williamson County* protects those governments from the typically higher costs of litigating challenges to police-power regulation in federal courts. It also ensures that those challenges are heard in state courts, which have greater knowledge of and experience with the state law issues they present.

This brief is filed on behalf of the following amicus organizations:

- The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three Territories, and two Commonwealths.

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[1] All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or part, and no party or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution intended to fund this brief's preparation or submission.

- The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.
- The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.
- The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.
- The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

- The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.
- The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.
- The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

SUMMARY OF ARGUMENT

Since the moment this Court decided *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), plaintiffs and property-rights-advocacy groups have tilted at the Court's holding that plaintiffs challenging state or local regulation as a taking of property must seek and be denied just compensation through the procedures provided by the state. They argue the requirement has created a procedural morass and fundamental unfairness. That is their justification for asking this Court to overturn 30 years of precedent.

But the lower courts' application of *Williamson County*—including the cases Petitioner and her amici rely on—show the state-compensation requirement to be merely a windmill. Not one of those cases supports their depiction of *Williamson County* as a menace. On the contrary, this Court and the lower courts have ensured that the state-compensation requirement is not gamed to deprive property owners of their day in court.

At root, Petitioner's complaint is that she cannot have her favored forum (she did not even attempt to seek compensation under the procedure provided by Pennsylvania). But as this Court unanimously recognized in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), plaintiffs have no constitutional right to a federal forum. State courts are fully competent to fairly adjudicate claims that regulation has "taken" property. If there is a problem with *Williamson County,* it is not that it is unmanageable, as Petitioner contends. It is rather that claimants like Petitioner have refused to accept the rule, causing unnecessary procedural disputes.

To be sure, several justices of this Court have questioned the state-compensation requirement in light of the rule that claimants under 42 U.S.C. § 1983 need not exhaust state judicial remedies. The answer is that the Fifth Amendment's Takings Clause is unlike its neighbors. It does not limit the government's power to burden the exercise of property rights. Rather, it imposes a *condition* on the sovereign prerogative to take private property—a condition that the owner be justly compensated. Unlike denial of equal protection or infringement of the liberty of free expression—neither of which can be sustained by payment of compensation—taking of property is not unconstitutional if the property owner is compensated. The state's denial of just compensation is therefore an element of a claim for violation of the Takings Clause. *Williamson County* is thus *not* an exhaustion requirement.

Takings claims are also different from other constitutional claims because questions of state law—in particular the law of property, which varies considerably among the states—are intimately bound up with the constitutional analysis. Specifically, the court must construe state law to determine whether a compensable interest exists *vel non*, the boundaries of that interest, the extent to which existing property law gave rise to reasonable expectations of a particular use of the property, and whether the government's action merely implemented "background principles" of property law that inhere in the owner's title. No other constitutional provision imposes such demands on a reviewing court. This Court's federalism principles point to state courts as the optimal fora to apply their own law.

Williamson County's critics are also wrong about the supposed efficiency benefits of overruling it; efficiency in fact cuts the other way. Beyond state courts' familiarity with state property law, they are far more expert in the state statutory issues that so often accompany takings claims. Federal courts have consistently refused to referee the run-of-the-mill land-use disputes that form the basis of most takings cases. Accordingly, if the state-compensation requirement were eliminated, federal courts would either become bogged down in picayune battles, or they would repeatedly abstain from hearing claims until the state law issues are resolved by state courts. Trading the clear state-compensation requirement for ad hoc abstention is a lousy deal.

This Court granted certiorari in this case after years of turning away petitions seeking to undo *Williamson County*. Yet Petitioner has jarringly *abandoned* the primary argument she made in support of the petition. The Court has previously dismissed petitions as improvidently granted in such circumstances. That Petitioner asks the Court to take the extraordinary step of repudiating a settled precedent provides additional reason for doing so here.

ARGUMENT

I. *Williamson County*'s state-compensation requirement is neither unworkable nor unfair.

"Before overturning a long-settled precedent," this Court requires "'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)). As the sole "special justification" for overruling 30 years of precedent, Petitioner and her amici depict *Williamson County* as an unworkable and unfair doctrine that prevents aggrieved property owners from having their takings claims heard.

But the cases they cite paint an entirely different picture. Courts have consistently applied *Williamson County* to avoid injustice. Only when property owners have attempted to evade its clear rule—as Petitioner did here—have they encountered problems.

A. The cases cited by Petitioner and her amici bear no resemblance to the rogues' gallery depicted in their briefs.

Petitioner and her amici cite purported examples of takings plaintiffs stymied by the state-compensation requirement. *See, e.g.*, Petitioner's Brief on the Merits ("Pet. Br.") 24-27, 30-33; Brief of AARP et al. ("AARP Br.") 7-10; Brief of Citizens' Alliance for Property Rights Legal Fund et al. ("Citizens' Alliance Br.") 13-14; Brief of Ohio Farm Bureau ("OFB Br.") 9; Brief of San Remo Hotel et al. ("San Remo Br.") 7-9. Specifically, Petitioner appears concerned that a plaintiff's access to state court is "illusory" when, to comply with *Williamson County* and *San Remo*, the plaintiff first files both state inverse condemnation and federal takings claims in state court, only to have the defendant remove the case to federal court. Pet. Br. 30. Then, Petitioner fears, the federal court will dismiss the claims for failure to comply with *Williamson County*, leaving a plaintiff without a lawsuit despite her efforts to follow the correct procedure.

The cases cited reveal no such injustice. Instead, they show that on removal of a takings case, federal courts either remand the case to state court or consider any *Williamson County* argument waived. Either way, the plaintiff gets her day in court. Notably, in none of Petitioner's cases was a plaintiff deprived of a hearing on her takings claim where she followed the proper procedure.

Petitioner points to *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006), as a case in which a federal court dismissed a takings claim removed from state court. Pet. Br. 31. But there, the plaintiffs did not comply with *Williamson County*: they brought only a federal takings claim in state court and thus failed to follow the state's inverse condemnation procedure for seeking compensation. *See Koscielski v. City of Minneapolis*, 393 F. Supp. 2d 811, 818 (D. Minn. 2005). Had they raised the inverse condemnation claim along with their federal takings claim, the federal court could have exercised supplemental jurisdiction over the state claim or remanded it to state court, allowing the merits to be heard either way. It was not *Williamson County* that barred the plaintiffs' way; it was their own failure to follow the available state procedure.

As for *Clifty Properties, LLC v. City of Somerset*, Petitioner fails to tell the whole story. Pet. Br. 31 (citing *Clifty Props., LLC v. City of Somerset*, No. 6:17-41, 2017 U.S. Dist. LEXIS 146474 (E.D. Ky. Sept. 11, 2017)). In the September 11, 2017 ruling Petitioner cites, the district court dismissed federal and state claims removed from state court. But on the plaintiff's motion to amend or vacate that decision, the court held that the defendant waived any *Williamson County* argument by removing the case. *Clifty Props., LLC v. City of Somerset*, No. 6:17-41, 2017 U.S. Dist. LEXIS 207937, at *9 (E.D. Ky. Dec. 19, 2017). The court reinstated the federal takings claim and state law claims, and the plaintiff had its day in federal court. *Id.*

In *Wayside Church v. Van Buren County*, cited by Amicus AARP (AARP Br. 8-15), the plaintiff never attempted to follow the state's compensation procedure. 847 F.3d 812, 816 (6th Cir.), *cert. denied* 138 S. Ct. 380 (2017). Instead, it filed suit in federal court, alleging that no adequate state procedures for compensation were available. *Id.* at 816, 819. The Sixth Circuit held that the plaintiff could have brought its state and federal takings claims in state court. *Id.* at 821. There is no injustice here, just a failed litigation strategy. Regardless, the plaintiff could still seek compensation through the state's procedure.

The problems encountered by the San Remo Amici (San Remo Br. 7-9) similarly were of their own making: they refused to pursue state-compensation procedures before bringing their claims in federal court. *See Kottschade v. City of Rochester*, 319 F.3d 1038, 1039-40 (8th Cir. 2003); *Pakdel v. City & County of San Francisco*, No. 17-cv-03638, 2017 U.S. Dist. LEXIS 211032, at *11 (N.D. Cal. Nov. 20, 2017).

The remaining cases cited by Petitioner and her amici are no more helpful. Each falls into one of two categories: (1) the plaintiff never attempted to follow the state's compensation procedure, or (2) the plaintiff's claims were heard in state or federal court:

- In *Sandy Creek Investors, Ltd. v. City of Jonestown*, the defendant removed state and federal takings claims that plaintiff filed in state court. 325 F.3d 623, 625 (5th Cir. 2003). The Fifth Circuit held that *Williamson County* required the matter to be remanded. *Id.* at 626.

- In *Ohad Associates, LLC v. Township of Marlboro*, the plaintiff filed a lawsuit in state court alleging some state claims and a federal takings claim, but did not include a claim under the state's eminent domain act, as required to seek compensation for an alleged taking. No. 10-2183, 2011 U.S. Dist. LEXIS 8414, at *3 (D.N.J. Jan. 28, 2011). The defendant removed the suit, and the district court dismissed the federal takings claim for failure to comply with *Williamson County* due to the plaintiff's failure to follow the available state-compensation procedure. *Id.* at *3, 8.

- In *Arrigoni Enterprises, LLC v. Town of Durham*, the plaintiff sought only to overturn a zoning decision in state court before filing a federal takings claim in federal court. 606 F. Supp. 2d 295, 297, 299-300 (D. Conn. 2009). Because the plaintiff never sought compensation under the state's procedure, the Second Circuit held that the district court properly dismissed the federal takings claim. *Arrigoni Enters., LLC v. Town of Durham*, 629 Fed. Appx. 23, 25 (2d Cir. 2015), *cert. denied* 136 S. Ct. 1409 (2016).
- In *Warner v. City of Marathon*, the plaintiff's state lawsuit was removed to federal court, after which the plaintiff amended his complaint three times. The final complaint alleged a federal takings claim and other state and federal claims. 718 Fed. Appx. 834, 836-37 (11th Cir. 2017). The district court dismissed the federal takings claim with prejudice, but the Eleventh Circuit vacated that order, and instructed the district court to dismiss it without prejudice, to allow the plaintiff to bring a state-

compensation claim in state court. *Id.* at 838. The plaintiff was able to successfully pursue his claim in state court. Citizens' Alliance Br. 14-15.

- Petitioner's remaining cases—***Reahard v. Lee County***, 30 F.3d 1412, 1418 (11th Cir. 1994); ***8679 Trout, LLC v. North Tahoe Public Utilities District***, No. 2:10-cv-01569, 2010 U.S. Dist. LEXIS 93303, at *17 (E.D. Cal. Sept. 8, 2010); ***Doak Homes, Inc. v. City of Tukwila***, No. C07-1148, 2008 U.S. Dist. LEXIS 7740, at *11-12 (W.D. Wash. Jan. 18, 2008); ***Anderson v. Chamberlain***, 134 F. Supp. 2d 156, 162 (D. Mass. 2001); ***Rau v. City of Garden Plain***, 76 F. Supp. 2d 1173, 1174 (D. Kan. 1999); and ***Seiler v. Charter Township of Northville***, 53 F. Supp. 2d 957, 964 (E.D. Mich. 1999)—were all remanded to state court for adjudication.

In sum, Petitioner and her amici cannot point to a *single* case in which a takings claimant was denied a forum for her claim. Given that ***Williamson County***'s supposed "unworkability" is Petitioner's sole "special justification" for its overruling, the Court should decline her request. *See Halliburton Co.*, 134 S. Ct. at 2407.

B. Courts have ample flexibility to avoid the unfair outcomes Petitioner fears.

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, the Court clarified that the state-compensation requirement is not jurisdictional. 560 U.S. 702, 729 (2010); *see also*

Horne v. Dep't of Agric., 569 U.S. 513, 525-26 (2013). Rather, having sought and been denied compensation through an available and adequate state-compensation procedure is an "element[] that must be shown in any [federal] takings claim." *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 512 (2d Cir. 2014); *see also infra* Section II.A.

That clarification, which the lower courts have now almost universally acknowledged,[2] has ensured that courts can apply *Williamson County* pragmatically to avoid the parade of horribles Petitioner fears. (In fact, most of Petitioner's cases were decided before that clarification.)

First, courts have found that a defendant has waived the state-compensation requirement through its actions or neglect of the argument. In *Stop the Beach Renourishment*, this Court held that the respondent waived its state-compensation defense because it was not raised in the opposition to the petition for certiorari. 560 U.S. at 729; *see also, e.g.*, *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1108-10 (N.D. Cal. 2007) (declining to entertain *Williamson County* argument first raised after two years of litigation and defendant's own removal to federal court).

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[2] *See Sherman v. Town of Chester*, 752 F.3d 554, 561 (2d Cir. 2014); *Knick v. Twp. of Scott*, 862 F.3d 310, 327 (3d Cir. 2017); *Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013); *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 88-89 (5th Cir. 2011); *Lilly Invs. v. City of Rochester*, 674 Fed. Appx. 523, 526 (6th Cir. 2017); *Peters v. Vill. of Clifton*, 498 F.3d 727, 734 (7th Cir. 2007); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 (9th Cir. 2010) (en banc); *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1299 n.21 (10th Cir. 2008); *Hadar v. Broward County*, 692 Fed. Appx. 618, 623 (11th Cir. 2017). The First Circuit has not taken a firm position on the issue, *see Perfect Puppy, Inc. v. City of E. Providence*, 807 F.3d 415, 420-21 (1st Cir. 2015), and the Eighth Circuit has not addressed it since this Court's decision in *Stop the Beach Renourishment*, *see Snaza v. City of St. Paul*, 548 F.3d 1178, 1182 (8th Cir. 2008).

Likewise, if a defendant removes a lawsuit alleging both a federal takings claim and a properly pled state inverse condemnation claim, the district court may hear the claims because the defendant's voluntary action in removing the case prevented the plaintiff from complying with the state-compensation requirement.[3] *See, e.g.*, *Lilly Invs. v. City of Rochester*, 674 Fed. Appx. 523, 531 (6th Cir. 2017); *Robinson v. City of Baton Rouge*, No. 13-375, 2016 U.S. Dist. LEXIS 146461, at *88 (M.D. La. Oct. 22, 2016); *Race v. Bd. of County Comm'rs of Lake*, No. 15-cv-1761, 2016 U.S. Dist. LEXIS 40331, at *11 (D. Colo. Mar. 28, 2016); *Athanasiou v. Town of Westhampton*, 30 F. Supp. 3d 84, 88 (D. Mass. 2014); *Merrill v. Summit County*, No. 2:08CV723, 2009 U.S. Dist. LEXIS 16056, at *5, 10 (D. Utah Mar. 2, 2009).

To do otherwise would "create the possibility for judicially condoned manipulation of litigation." *Sansotta*, 724 F.3d at 545; *accord Sherman v. Town of Chester*, 752 F.3d 554, 568-69 (2d Cir. 2014) (court "cannot accept" tactic of removing federal takings claim to federal court, then seeking to dismiss claim); *Key Outdoor, Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003) (because removal "frustrated plaintiffs' efforts to invoke state remedies," defendant "either surrendered the benefit of *Williamson* or consented in advance to the remand of state-law theories, so that the process required by *Williamson* could run its course").

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[3] Nevertheless, the plaintiff may request remand to state court based on *Williamson County*. *See, e.g.*, *Norma Faye Pyles Lynch Family Purpose, LLC v. City of Cookeville, Tenn.*, 207 F. Supp. 3d 825, 831-32 (M.D. Tenn. 2016); *VRC, LLC v. City of Dallas*, 391 F. Supp. 2d 437, 440, 442 (N.D. Tex. 2005).

Second, federal courts have exercised their discretion to bypass the state-compensation requirement where a federal takings claim can be disposed of on another basis, thus avoiding a pointless further round of litigation in state court. In *Guggenheim v. City of Goleta*, the Ninth Circuit en banc rejected the plaintiff's federal takings claim on the merits despite the city's state-compensation defense, thus avoiding "wast[ing] the parties' and the courts' resources to bounce the case through more rounds of litigation." 638 F.3d at 1118; *see also, e.g.*, *Wilkins v. Daniels*, 744 F.3d 409, 418 (6th Cir. 2014) (declining to apply *Williamson County* where it was "clear that there has been no 'taking,'" and thus "no jurisprudential purpose is served by delaying consideration of the issue"); *Vasquez v. Foxx*, No. 17-1061, 2018 U.S. App. LEXIS 18839, at *15 (7th Cir. July 11, 2018) (rejecting takings claim on merits); *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148-49 (9th Cir. 2010) (rejecting claim based on res judicata).

As these cases demonstrate, courts have applied *Williamson County* pragmatically. In lieu of uprooting that precedent, this Court can reaffirm that compliance with the state-compensation requirement is an element of a Fifth Amendment takings claim, rather than a requirement of Article III ripeness. It can thus underscore that courts can consider it waived in appropriate circumstances or decline to require resort to state court where doing so would be futile. *Cf. Halliburton Co.*, 134 S. Ct. at 2414-17 (declining to overrule precedent but clarifying how it must be applied).

C. *Williamson County* does not require a claimant to seek compensation from the state if the state offers no fair process for doing so.

Under *Williamson County*, a plaintiff must follow the state's compensation procedure only if "a 'reasonable, certain and adequate provision for obtaining compensation' exists at the time of the taking." 473 U.S. at 194 (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)). Federal courts have thus heard federal takings claims where state procedures are unavailable or inadequate. For example, where a state lacks *any* compensation procedure—such as an inverse condemnation statute—federal courts will hear a federal claim. *See, e.g.*, *Kruse v. Vill. of Chagrin Falls*, 74 F.3d 694, 700-01 (6th Cir. 1996); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990). Additionally, where a state procedure exists but is not available for the specific situation at hand, courts recognize that the state remedy is inadequate. *See, e.g.*, *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 456-58 (7th Cir. 2002) (pursuing state compensation futile where nature of claim did not satisfy criteria for state inverse condemnation procedure); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1556, 1575 (10th Cir. 1995) (no state remedy available where alleged taking was caused by government officials not subject to inverse condemnation statute). This safeguard further ensures no plaintiff will be barred from having a takings claim heard through no fault of her own.

D. The interaction of *San Remo* and *Williamson County* creates no injustice.

As this Court recognized unanimously in *San Remo Hotel, L.P. v. City and County of San Francisco*, if issues essential to a federal takings claim are decided in state court in the process of litigating a state inverse condemnation claim, the Full Faith and Credit Act (FFCA), 28 U.S.C. § 1738, precludes the plaintiff from relitigating those issues in federal court. *See* 545 U.S. at 347-48 (Rehnquist, C.J., concurring) ("Whatever the reasons for petitioners' chosen course of litigation in the state courts, it is *quite clear* that they are now precluded by the full faith and credit statute ... from relitigating in their [federal] action those issues which were adjudicated by the California courts.") (emphasis added). This straightforward application of the FFCA also does not unfairly prejudice takings claimants, contrary to Petitioner's contention. Pet. Br. 24-25; Brief of American Farm Bureau Federation et al. 18; Brief of New England Legal Foundation 14; OFB Br. 10; Brief for the States of Texas & Oklahoma 9-10.

San Remo reflects the same respect afforded to state judicial decisions in any other context, and Petitioner is unable to explain why takings claims should be treated differently. This Court has consistently reaffirmed that state courts are fully competent to adjudicate federal claims, including constitutional claims. *San Remo*, 545 U.S at 342-43 (citing *Allen v. McCurry*, 449 U.S. 90, 93, 103-04 (1980)); *see also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (holding state courts are "presumptively competent . . . to adjudicate claims arising under the laws of the United States"); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J.) (rejecting the notion that "state courts are a less than adequate forum for resolving federal questions. A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism."). And just like federal courts, "[s]tate courts . . . have a constitutional obligation to safeguard personal liberties and to uphold federal law."[4] *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). There is no constitutional or statutory reason that a plaintiff must have a federal forum. *See San Remo*, 545 U.S. at 344.

State inverse condemnation claims can preclude relitigation of identical issues in Fifth Amendment claims merely because state courts often rely on this Court's Fifth Amendment principles in applying their own inverse condemnation statutes and state-constitutional takings provisions. *See, e.g.*, *San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 108-10 (Cal. 2002); *Tolksdorf v. Griffith*, 626 N.W.2d 163, 167-68 (Mich. 2001); *City of Houston v. Carlson*, 451 S.W.3d 828, 831 (Tex. 2014). Consequently, the result in *San Remo* is troubling only if one believes that state courts are less competent than federal courts to apply those principles.

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[4] Petitioner has provided no evidence or argument that local courts are more predisposed to favor local governments than local property owners.

Petitioner's contention that the combination of *Williamson County* and *San Remo* creates a "catch-22" or "trap," Pet. Br. 25, appears to be based on the belief, unfortunately fostered by *Williamson County* itself, that the state-compensation requirement is a requirement of ripeness. *See Williamson County*, 473 U.S. at 194-95. How can it be, Petitioner asks, that a procedure necessary to "ripen" a federal takings claim also prevents the claim from being adjudicated? Pet. Br. 25-26 (takings claims go from "unripe" to "rotten"). However, when the state-compensation requirement is properly viewed—as an element of the plaintiff's claim—any rhetorical force of Petitioner's "catch-22" dissolves. It is hardly anomalous that a plaintiff cannot litigate an issue essential to two claims in two consecutive lawsuits. Here, too, the Court can clarify rather than vitiate, by emphasizing that the state-compensation requirement is not one of ripeness.

As this Court held in *San Remo*, the FFCA applies unless Congress has carved out an exception for a particular claim or issue. 545 U.S. at 344. There is no such exception for federal takings claims, *id.* at 348 (Rehnquist, C.J., concurring), despite what Petitioner might hope, *see* Pet. Br. 26-27. However, Congress can resolve any perceived unfairness by creating such an exception to the FFCA. The Constitution does not compel Congress to maintain the FFCA in its current form, and if a change is warranted, Congress may make the change.

II. The Takings Clause *is* different.

Chief Justice Rehnquist's *San Remo* concurrence presents the central question to be resolved in this case. Why, he asked, must takings claimants first go to state court, "while . . . plaintiffs [may] proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment, or the Equal Protection Clause"? 545 U.S. at 350-51 (Rehnquist, C.J., concurring) (citations omitted). The answer is that a Fifth Amendment takings claim is unlike those other constitutional claims in two fundamental, structural ways: (1) the state's denial of compensation is an element of a claim under the Takings Clause, and (2) state law dictates, literally and figuratively, the boundaries of the "private property" that the Clause protects.

A. The state's denial of compensation is an element of a claim for violation of the Takings Clause.

Williamson County is a straightforward application of the principle that only *uncompensated* takings are unconstitutional. The government has the sovereign power to take property with payment of compensation. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). The Takings Clause therefore provides that "nor shall private property be taken for public use, *without just compensation*." (Emphasis added.) Accordingly, this Court has held, and merely reaffirmed in *Williamson County*, that takings are unconstitutional only if uncompensated. *See Williamson County*, 473 U.S. at 194 n.13 ("[B]ecause the Fifth Amendment proscribes takings *without just* *compensation*, no constitutional violation occurs until just compensation has been denied."); *see also, e.g.*, *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 718 (1999) (opinion of Kennedy, J.) ("[T]here is no constitutional or tortious injury until the landowner is denied just compensation."); *Preseault v. ICC*, 494 U.S. 1, 11 (1990); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 n.10 (1987) ("[A]s a matter of law, an illegitimate taking [does] not occur until the government refuses to pay . . . ."); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949) (holding "the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment"); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) (holding "the illegality . . . is confined to the failure to compensate [the plaintiff] for the taking"). The Court referred to this principle in *Williamson County* as "the special nature of the Just Compensation Clause." 473 U.S. at 195 n.14.

Williamson County was therefore correct to hold that if the state "has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,'" then "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." 473 U.S. at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n.21 (1984)). As the United States explained in its brief, the Fifth Amendment has never been understood to require that compensation be paid at the time of a taking. Brief for the United States ("U.S. Br.") 8-16. As long as the state offers a viable post-taking process for obtaining compensation, a property owner has not suffered an uncompensated taking until she has followed that process.

The state's denial of just compensation is an element of a Fifth Amendment takings claim that is missing from all other constitutional claims. To use the examples noted by Chief Justice Rehnquist, the Equal Protection Clause does not ask whether a state has compensated the plaintiff after treating her differently from someone similarly situated. And the First Amendment does not ask whether the state has compensated a speaker in censoring her speech. In both cases, even if compensation were provided, the challenged state action could not stand. "No amount of compensation can authorize such action," this Court held in *Lingle v. Chevron U.S.A. Inc.*, in distinguishing such typical constitutional claims from takings claims. 544 U.S. 528, 543 (2005). The Takings Clause, by contrast, imposes only an "obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Stop the Beach Renourishment*, 560 U.S. at 736 (Kennedy, J., concurring) ("Unlike the Due Process Clause, . . . the Takings Clause implicitly recognizes a governmental power while placing limits upon that power.").

The Takings Clause does recognize a different claim that is directly akin to an equal protection or First Amendment claim: a claim that property has been taken for something other than a *public use*. Like a regulation that censors speech, a regulation that takes property for a *private* use is "impermissible"; it cannot be saved by paying compensation. *Lingle*, 544 U.S. at 543. Because payment of compensation *vel non* is irrelevant to such a claim, a property owner need not seek it before she can state a claim for violation of the Fifth Amendment. *See, e.g.*, *Carole Media LLC v. N.J. Transit Co.*, 550 F.3d 302, 308 (3d Cir. 2008).

For the first time, Petitioner asserts in her merits brief that denial of compensation is not an element of the claim and that the Takings Clause is instead solely "remedial," citing *First English*. Pet. Br. 17-19. *First English* held no such thing. On the contrary, it expressly recognized that only uncompensated takings are unconstitutional, consistent with the numerous cases cited above. 482 U.S. at 320 n.10. The notion that the Clause merely provides a procedural mechanism for obtaining compensation for state takings is also inconsistent with the Clause's history: it was applied to the states only because an uncompensated taking was considered a violation of the right to due process. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). Petitioner's argument thus conflicts with over a century of precedent.[5]

In sum, the "special nature" of the Takings Clause—that it imposes a condition on the lawful taking of property—distinguishes takings claims from other constitutional claims. Other constitutional rights like freedom of expression or equal treatment under the law are subject to no comparable limitation because no amount of money can sustain actions that violate those rights.

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[5] Petitioner's theory of the Clause as providing only a remedial procedure also entirely ignores the public-use requirement, which imposes a further condition on the exercise of the power to take property.

B. Takings claims rely on state property law, and *Williamson County* ensures that state courts have the opportunity to construe and apply that law.

A more practical answer to Chief Justice Rehnquist's question lies in the uniquely pivotal role of state property law in takings claims. No constitutional provision beyond the Takings Clause leans so heavily on state law.

This Court has repeatedly emphasized "the basic axiom that '[property] interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Monsanto*, 467 U.S. at 1001 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)) (alterations in original); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting) ("Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them."); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998); *Preseault*, 494 U.S. at 21 (O'Connor, J., concurring) (citing *Monsanto*). State courts are the authoritative exponents of that law, and *Williamson County* sensibly affords them the primary opportunity to construe and apply it.

1. Several interrelated strands of takings doctrine require courts to apply state property law.

First and foremost, "the first step of the Takings Clause analysis is still to identify the relevant 'private property.'" *Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting). In doing so, courts look to state law. *See, e.g.*, *Phillips*, 524 U.S. at 164 (interest accrued in trust accounts is property under Texas law); *Monsanto*, 467 U.S. at 1001-02 (Missouri law recognized trade secrets as property); *Armstrong*, 364 U.S. at 44 (in Maine, materialman's lien constituted compensable property interest); *Collopy v. Wildlife Comm'n, Dep't of Natural Res.*, 625 P.2d 994, 999 (Colo. 1981) (Colorado law does not recognize a compensable "right to hunt wild game upon one's own land"); *New Eng. Estates, LLC v. Town of Branford*, 988 A.2d 229, 243 (Conn. 2010) (option contract not compensable property interest under Connecticut law).

Second, under the test adopted in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), which now forms the bedrock of the Court's takings jurisprudence, *see Lingle*, 544 U.S. at 538-39, a court must consider the extent to which the challenged action interferes with "distinct investment-backed expectations." *Penn Cent.*, 438 U.S. at 124; *see also Monsanto*, 467 U.S. at 1005-06. The reasonableness of those expectations is shaped in substantial part by state property law. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034-35 (1992) (Kennedy, J., concurring); *Palazzolo v. Rhode Island*, 533 U.S. 606, 634-36 (2001) (O'Connor, J., concurring); *see also, e.g.*, *Philip Morris v. Reilly*, 312 F.3d 24, 50 n.25 (1st Cir. 2002) (state law defined reasonable investment-backed expectations in trade secret); *Allegretti & Co. v. County of Imperial*, 138 Cal. App.

4th 1261, 1279 (Cal. Ct. App. 2006) (evaluating reasonableness of expectations based on state groundwater rights law).

Third, in *Lucas*, the Court recognized an affirmative defense based on "background principles of nuisance and property law." 505 U.S. at 1030-31. The background-principles defense has subsequently been applied to a variety of state law property rules. *See, e.g.*, *Sansotta*, 724 F.3d at 541 (public trust doctrine and nuisance); *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 985-87 (9th Cir. 2002) (public trust doctrine); *Vanek v. State*, 193 P.3d 283, 292 (Alaska 2008) (fishing permits); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (doctrine of custom). The application of such principles differs markedly from state to state. *Compare, e.g.*, *State ex rel. Thornton v. Hay*, 462 P.2d 671, 676-77 (Or. 1969) (Oregon doctrine of custom mandates public access to dry sand beach) *with Op. of the Justices (Pub. Use of Coastal Beaches)*, 649 A.2d 604, 610-11 (N.H. 1994) (dry sand beach private property to high-water mark). In fact, Petitioner's claim may be susceptible to the background-principles defense insofar as the challenged regulation replicates the special treatment of burial grounds at common law in Pennsylvania. *See* Brief for Respondents 11-13, 48.

Finally, the Court has looked in principal part to state law in defining the "parcel as a whole" to evaluate the severity of the challenged regulation's impact on the property. *See Murr*, 137 S. Ct. at 1948; *see also id.* at 1954 (Roberts, C.J., dissenting) (parcel-as-a-whole inquiry should be based solely on "state property principles"); *see also, e.g.*, *Coast Range Conifers, LLC v. Oregon*, 117 P.3d 990, 998

(Or. 2005) (holding under Oregon law that "timber is part of the underlying real property unless it is subject to a contract to be cut," and refusing to sever timber for purposes of parcel as a whole rule).

Each of these aspects of the Court's takings doctrine provides a different view of the same landscape: the "objective rules and customs" created by state law that shape private property interests. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). The nature of those state "rules and customs" is often determinative of whether regulation effects a taking.

Neither the First Amendment nor the Equal Protection Clause requires courts to wade so deeply, if at all, into state law. *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 218-19 (2004). For example, none of the equal protection or First Amendment cases cited by Chief Justice Rehnquist involved any substantial question of state law. *San Remo*, 545 U.S. at 350-51 (Rehnquist, C.J., concurring).

2. State courts, of course, have the principal role in creating, construing, and applying state property law. *See, e.g.*, *Stop the Beach Renourishment*, 560 U.S. at 743 (Breyer, J., concurring); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Thus "[t]he requirement to seek compensation prior to bringing suit will often serve important federalism interests." *Wilkins*, 744 F.3d at 418. In "cases that turn on whether the plaintiff has a property interest as defined by state law"—as noted above, a wide swath of takings cases—the state-compensation requirement "will prevent a federal court from reaching the merits prematurely." *Id. Williamson County* therefore appropri-

ately gives state courts the first bite at the apple in applying their own law.

However, in cases in which state courts apply federal case law in implementing state procedures, this Court has the final say as to whether the cases have been properly applied. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617-25 (1989). And in extreme circumstances, the Court has recognized that a state court's egregious realignment of state property law may itself raise constitutional concerns. *See Stop the Beach Renourishment*, 560 U.S. at 715 (opinion of Scalia, J.); *id.* at 737 (Kennedy, J., concurring); *Webb's Fabulous Pharmacies*, 449 U.S. at 164. However, the possibility that federal courts might provide a backstop to police state courts' application of their own property law in extreme circumstances does not undercut the basic principle of federalism that state courts should retain responsibility for developing and applying their own property law in the vast run of cases.

III. Overruling *Williamson County* would not serve judicial economy.

Petitioner claims that overruling *Williamson County* would conserve the resources of courts and litigants. Pet. Br. 32-33. But Petitioner has it backwards: she would have this Court replace a simple rule with new, substantial burdens and uncertainty for the federal courts and litigants. Overruling *Williamson County* offers a penny-wise, pound-foolish "economy."

A. *Williamson County* protects federal courts from refereeing routine state law disputes over land-use regulation.

Takings claims arise frequently, perhaps most frequently, in disputes over local governments' regulation of land use.[6] In *San Remo*, the Court recognized that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulation." 545 U.S. at 347. This is because "regulation of land use is perhaps the *quintessential* state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added); *see also Mt. Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 487 (10th Cir. 1998) ("Land use policy such as zoning customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong.").

Such disputes are particularly fraught with questions of state and local community policy. They thus typically involve numerous state law issues beyond the claim that the regulation effects a taking.

> State courts frequently invalidate local land use regulations based on inadequate statutory authority, state preemption principles, or provisions in state constitutions. In addition, state courts frequently scrutinize local land use decisions to determine whether they are

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[6] Of the 21 *Williamson County* cases cited by Petitioner, 15 involve takings claims concerning local land-use regulation.

> arbitrary, unreasonable, or unsupported by substantial evidence. These doctrinal limitations operate in conjunction with takings claims to police local regulators.

Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 Wm. & Mary L. Rev. 251, 290-291 (2006) (footnotes omitted; citing cases).

Takings cases abound involving state law issues such as compliance with state planning and zoning statutes,[7] statutes limiting exactions,[8] statutes governing subdivision of land,[9] and compliance with state constitutional provisions.[10] And they are called upon to construe and apply land-use statutes in adjudicating inverse condemnation claims.[11]

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[7] *See, e.g.*, *Iowa Coal Mining Co. v. Monroe County*, 494 N.W.2d 664 (Iowa 1993) (alleging zoning ordinance in violation of state enabling statute and regulatory taking based on denial of landfill permit); *Edwards v. City of Warner Robins*, 807 S.E.2d 438 (Ga. 2017) (claim that adoption of zoning ordinance prohibiting mobile home park violated notice requirements of state law and effected a taking); *State ex rel. Chiavola v. Vill. of Oakwood*, 931 S.W.2d 819 (Mo. Ct. App. 1996) (second appeal in action alleging zoning ordinance violated state planning statutes and state constitutional provisions and effected taking); *Mayhew v. Sunnyvale*, 774 S.W.2d 284 (Tex. App. 1989) (case alleging violation of Texas Zoning Enabling Act and takings claims).

[8] *See, e.g.*, *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (applying state Mitigation Fee Act to avoid reaching takings claim based on monetary exaction imposed on developer).

[9] *See, e.g.*, *Marshall v. Bd. of County Comm'rs*, 912 F. Supp. 1456 (D. Wyo. 1996) (claims for violation of subdivision statute and inverse condemnation); *Bd. of Supervisors v. Greengael, LLC*, 626 S.E.2d 357 (Va. 2006) (same).

[10] *See, e.g.*, *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637 (Idaho 2004) (challenging statute that authorized agricultural field burning as taking and on multiple state constitutional grounds); *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168 (Iowa 2004) (challenging statute granting animal feeding operations

For example, in *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188 (Cal. 1998), the plaintiff challenged the Commission's jurisdiction under the California Coastal Act and alleged that its assertion of jurisdiction over a lot-line adjustment effected a taking by delaying the plaintiff's development project. *Id.* at 1192. The court "recogni[zed] that a judicial determination of the validity of certain preconditions to development is a normal part of the development process," and noted that "[t]he resolution of these cases often turns on the construction and application of complex statutory schemes." *Id.* at 1203 (citing numerous cases).

The courts of appeals have therefore long recognized that land-use disputes present fundamentally local fights that federal courts should not referee. In *Hoehne v. County of San Benito*, 870 F.2d 529 (9th Cir. 1989), for example, the court noted that the final decision component of *Williamson County* "guard[s] against the federal courts becoming the Grand Mufti of local zoning boards." *Id.* at 532; *see also Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005) (*Williamson County* recognizes that "land use disputes are uniquely matters of local concern more aptly suited for local resolution."). The courts have thus "repeat[ed] the admonition that federal

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immunity from nuisance suit as taking and violation of state constitution).

[11] *See, e.g.*, *Hill-Grant Living Tr. v. Kearsarge Lighting Precinct*, 986 A.2d 662 (N.H. 2009) (construing zoning statute to determine ripeness of inverse condemnation claim).

courts should not become zoning boards of appeal. State courts are better equipped in this arena and we should respect principles of federalism . . . [and avoid] unnecessary state-federal conflict with respect to governing principles in an area principally of state concern." *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (quotation marks and citations omitted); *see also Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982); *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003) (Alito, J.); *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992); *New Burnham Prairie Homes, Inc. v. Vill. of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992).

Contrary to this longstanding view, abandoning *Williamson County*'s state-compensation requirement would demand that federal courts intervene in these common, distinctly local controversies, and it would put district courts in the position of routinely facing state statutory and administrative law claims under their supplemental jurisdiction. *But cf. Coeur d'Alene Tribe*, 521 U.S. at 276 (opinion of Kennedy, J.) ("[T]he elaboration of administrative law" is a "prime responsibilit[y] of the state judiciary.").

B. Overruling *Williamson County* would trade its predictable rule for unpredictable, ad hoc abstention.

In fact, if *Williamson County* is overturned, the federal courts are likely to shunt much of that litigation over state law questions back to the state courts. Given the prevalence of issues of state law integral to and accompanying takings claims, district courts are likely in many cases to abstain under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), to allow state courts to resolve those issues before deciding the takings claim.[12] If so, overruling *Williamson County* will not guarantee takings claimants a single, clear path through the federal courts, and the claimed efficiency benefits of overruling *Williamson County* will prove illusory.

Indeed, district courts have abstained when confronted with takings claims that are not subject to *Williamson County*, such as the now-repudiated claims that regulation failed to "substantially advance a legitimate state interest."[13] *See, e.g.*, *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104-05 (9th Cir. 1998); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 409-10 (9th Cir. 1996); *Sea Cabin on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 828 F. Supp. 1241, 1249-50 (D.S.C. 1993) (abstaining under *Pullman* to allow state court to evaluate case under local non-conforming use statute before deciding federal takings claim); *see also Anderson v. Charter Twp. of*

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[12] In some cases, they might instead certify questions to the state supreme courts. *See* Sterk, *supra*, 48 Wm. & Mary L. Rev. at 293. There too, however, we would exchange a simple rule requiring direct recourse to state courts with a far more cumbersome route to state-court adjudication.

[13] This Court had held that such claims were not subject to the state-compensation requirement because they did not seek compensation, but rather invalidation, of the challenged regulation. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). This Court repudiated the "substantially advances" test in *Lingle*, 544 U.S. at 543-44.

Ypsilanti, 266 F.3d 487, 490 (6th Cir. 2001) (reversing district court's abstention under *Pullman* because state and federal constitutional provisions were identical). Indeed, this Court has recognized that abstention is often appropriate in the cognate context of eminent domain. *See La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959).

Abstention is discretionary. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996). It is therefore impossible to predict whether a court in any given suit will send the parties to state court. However, it *will* happen, and the federal courts' demonstrated reluctance to referee land-use disputes suggests it will happen frequently. Regardless, the lack of predictability about whether a court will abstain guarantees additional litigation over the issue.

Williamson County's clear state-compensation requirement avoids this problem. Given that its application has demonstrably *not* led to the inefficiency Petitioner claims, *see supra* Section I, it would be counterproductive to discard that rule.

C. The United States' novel theory would give district courts removal jurisdiction over state eminent domain actions.

The Solicitor General argues, remarkably, that plaintiffs may bring *state* inverse condemnation claims in federal court. U.S. Br. 19-21. He contends that a state inverse condemnation claim "arises" under the Constitution and therefore comes within the district courts' federal question jurisdiction under 28 U.S.C. § 1331(a). U.S. Br. 19.

If accepted, this argument would cause a radical departure from existing practice. But it also promises a mind-boggling side effect: it would allow nondiverse defendants to remove ordinary state and local eminent domain actions to federal court.

If the Solicitor General were correct, an affirmative eminent domain action would also present a federal question that a property-owner defendant could remove to federal court under 28 U.S.C. § 1441(a), which applies to "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Like inverse condemnation claims, eminent domain actions involve a constitutional component—determination of "just compensation"—that implicates federal Fifth Amendment precedent. *See, e.g.*, *Del Monte Dunes*, 526 U.S. at 714 (opinion of Kennedy, J.) ("When the government condemns property for public use, it provides the landowner a forum for seeking just compensation, as is required by the Constitution."); *Hurley*, 285 U.S. at 104. A landowner's ability to remove any eminent domain action to federal court would transform the law of eminent domain and the federal courts' dockets.

To be sure, eminent domain actions involving wholly diverse parties are already removable. But the difference between removal of the occasional eminent domain action involving an out-of-state property owner and potential removal of *any* eminent domain action is a chasm.

Moreover, recognizing that eminent domain actions brought by state or local condemnors do not belong in federal court, this Court developed a special abstention doctrine to allow district courts to return them to state court. *La. Power & Light Co.*, 360 U.S. at 28. Even if this Court were to later expand that case in accepting the Solicitor General's novel argument, many eminent domain actions would be removed to district court. At a minimum, the courts would be burdened with another expansion in abstention motion practice. The simple state-compensation requirement avoids this unintended consequence.

IV. The Court should dismiss the petition as improvidently granted.

Between her petition and opening brief on the merits, Petitioner switched her explanation of why *Williamson County* was supposedly wrongly decided. This Court should therefore dismiss the petition as improvidently granted.

Dismissing certiorari is appropriate where the petitioner "rel[ies] on a different argument in [her] merits briefing" from the one she relied on in her petition to "persuade[] [the Court] to grant certiorari." *Visa Inc. v. Osborn*, 137 S. Ct. 289, 289 (2016) (quoting *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772 (2015)).

Here, Petitioner first argued in her petition that *Williamson County* was doctrinally flawed and should be overturned because a regulatory taking is "uncompensated" at the moment of the final decision, rendering pursuit of state compensation unnecessary. Petition for Writ of Certiorari 20-23 (citing *Arrigoni*, 136 S. Ct. at 1410 (Thomas, J., dissenting from denial of certiorari)). In short, her argument accepted the premise that denial of just compensation is an element of a takings claim.

But her merits brief abruptly changes course, arguing instead that *Williamson County* was wrongly decided because the Takings Clause merely offers a remedial procedure, Pet. Br. at 34-35, relegating to a footnote the primary theory of the case from her petition, *id.* 38 n.14. With such "scant argumentation," it is as good as abandoned. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 615 (2013) (Roberts, C.J., concurring) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 223-24 (1997)).

In her petition, Petitioner invited this Court to repudiate settled precedent based on a particular legal argument and allegations that the precedent had proven unworkable. Petitioner has now pocketed that legal argument, and her allegations of the precedent's supposed practical problems have been shown to lack foundation. This is thus not the case presented in the petition. The Court should therefore dismiss the petition as improvidently granted.

CONCLUSION

This Court should refuse to overrule *Williamson County*. It should either affirm the judgment or dismiss the petition as improvidently granted.

Respectfully submitted,

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No. 17-647

IN THE

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER ON THE MERITS

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June 5, 2018

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INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court in a great variety of cases.

NELF believes that the rights of private property are not second-class constitutional rights. The immense expansion of regulatory law that has taken place at all levels of government has adversely affected the exercise of those rights, however. Since its founding, NELF has staunchly supported property owners in their efforts to vindicate their Fifth Amendment rights against these and other kinds of encroachment by government.

NELF appears as an amicus in the present case because it believes that a grave injustice was done to those rights in 1985, when this Court announced the so-called state litigation ripening requirement for federal takings claims, in its decision in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172 (1985). For the reasons set out here by NELF and elsewhere by the Petitioner, NELF believes that the decision to recognize this requirement is ill reasoned and poorly supported by precedent. It rests on a series of confusions, perhaps the most fundamental of which is the confusion of just compensation with a money damages remedy obtainable in court.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than NELF, made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3(a), NELF states that both Petitioner and Respondents have filed written consents to the filing of amicus briefs in support of either or neither party. The consents were docketed on April 30 and May 2, respectively.

The ***Williamson County*** ripening requirement has caused turmoil among property owners and consternation among lower courts and legal commentators, as this Court has been made aware by a host of petitions filed since 1985 earnestly asking it to reconsider the requirement. NELF welcomes the Court's decision to do so now, and it submits this brief in order to assist the Court in its reconsideration.

SUMMARY OF THE ARGUMENT

The "adequate process" for obtaining just compensation which is discussed in ***Ruckelshaus v. Monsanto Co.***, 467 U.S. 986, 1013 (1984), and which is fundamental to the ***Williamson County*** Court's reasoning, does not support the state litigation requirement because it refers to private negotiations and arbitration, not to court proceedings. In addition, the process determined only the *extent* of any taking that occurred, and so cannot support a state litigation requirement that hinges on a separate takings issue, i.e., the denial of just compensation.

For the same two reasons, *Monsanto* does not support the next step in *Williamson County* Court's reasoning, either, i.e., that federal litigation under the Tucker Act ripens federal takings claims for just compensation. Litigation under the Tucker Act cannot *ripen* a takings claim because its purpose is to *resolve* such claims. Least of all could Tucker Act litigation ripen a takings claim for later litigation under the Tucker Act, which is the mandatory vehicle for pursuing such claims against the United States. Hence, the attempted federal analogy fails to support the supposed ripening effect of state litigation.

Despite clearly stating earlier in *Williamson County* that exhaustion of remedies is not required for a 42 U.S.C. § 1983 takings claim, the Court required precisely that when it set out the state litigation requirement. It did so in the mistaken belief that a state court's final judgment denying money damages is merely the judicial analog of local government's failure to pay just compensation. In adopting that belief, the Court brought to a head its blurring of the distinction between ripening a claim and judicially resolving it.

Underlying the reasoning of *Williamson County* is the unexamined assumption that payment of just compensation under the Takings Clause is a remedy. But payment of just compensation is not a remedy; it is a constitutional limiting condition placed upon the power of government to take. Only when just compensation has *not* been paid does there arise an injury requiring a remedy. Hence, post-deprivation procedures regulating the timing, amount, and manner of payment of *just compensation* do not support the Court's conclusion that a state court post-deprivation lawsuit for a *money damages* *remedy* ripens a takings claim by finally determining that the "State" will not pay just compensation.

ARGUMENT

> "This is a case one can get easily confused on[,] I might say." Justice William J. Brennan, at oral argument of *Williamson County*[2]

I. The ***Williamson County*** Court's Reliance On ***Monsanto***'s Nonjudicial "Process" Does Not Support A Role For Courts In Ripening Takings Claims.

Williamson County's state litigation ripening requirement rests on a few broad brushstrokes of reasoning. In the first, the Court wrote:

> If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194–95 (1985) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018, n.21 (1984)).

Monsanto, a decision which Justice Harry A. Blackmun wrote only twelve months before he wrote the *Williamson County* opinion, was a singularly bad place for him to look for support for a state litigation ripening requirement, for in ***Monsanto*** the "adequate process" was not judicial. In fact, that process was created by Congress specifically to eliminate, to the extent possible, the need for litigation.

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[2] Transcript of Oral Argument, *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (No. 84–4), available at https://www.oyez.org/cases/1984/84-4 (last accessed May 29, 2018).

The facts of ***Monsanto*** bear this out. In ***Monsanto***, the Court addressed the question of whether a taking of property without just compensation arose from the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 467 U.S. at 1000–01. The act allowed certain trade secrets filed with the EPA by pesticide registrants to be used by their competitors when the latter sought to register their own pesticides. *Id.* at 992–93. Monsanto Company complained that the act thereby effected a taking of its intellectual property. However, FIFRA also required prior registrants like Monsanto and their later-filing competitors to work out, either through negotiations or through mandatory, binding, unreviewable arbitration, a fair price to be paid for any trade secrets so used. *Id.* at 994–95.

The FIFRA "process" therefore involved proceedings for the nonjudicial valuation of property and for the payment of a fair price for using it; the process did not involve litigation over the threshold question of whether there was any takings liability in the first place, as is the situation in the typical regulatory takings case, such as the present case or ***Williamson County*** itself. Only after FIFRA's negotiations/arbitration procedures were employed and only to the extent that Monsanto believed that the resulting compensation did not represent a fair valuation of its trade secrets was the company allowed to pursue a Tucker Act claim against the federal government for any shortfall. *Id.* at 1013 & n.16, 1018 & n.21.

Hence, under *Monsanto's* own highly exceptional facts, it might be true to say that "if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Williamson County*, 473 U.S. at 194–95 (quoting *Monsanto*). But it is very difficult to see how *Monsanto's* private, nonjudicial valuation procedures support a requirement that a takings plaintiff must ripen his federal claim by engaging in state litigation over the question of liability. The only sense in which Monsanto's takings claims had been dubbed "premature" and not "ripe" by the Court was that "no arbitration has yet occurred" and so the Court "cannot preclude the possibility that the arbitration award will be sufficient to provide Monsanto with just compensation, thus nullifying any claim against the Government." *Monsanto*, 467 U.S. at 1013 & n.16, 1020.

Significantly, in *Monsanto* the Court called FIFRA's unusual negotiation/arbitration scheme a "precondition" that had to be fulfilled in order "to determine the *extent* of the taking that has occurred." *Id.* at 1018 & n.21 (emphasis added). If that was its function, then it is clearly much more akin to *Williamson County's* final decision-making requirement for ripening a claim than to the state litigation one. *See Williamson County*, 473 U.S. at 191 n.12 (final decision-making requirement: "it is impossible to determine the *extent* of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations"), 195 (state litigation requirement: "the State's action here is not 'complete' until the State *fails to provide adequate compensation* for the taking") (emphasis added).

Hence, the Court's own view of FIFRA's "adequate process" in ***Monsanto*** undercuts what the Court sought to accomplish twelve months later when it cited that decision, i.e., to find support for using state litigation to ripen a federal takings claim based on a failure to pay just compensation.

Apparently intending to illustrate by an example the statement it just made, the ***Williamson County*** Court goes on to write, again in reliance on ***Monsanto***:

> Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491.

473 U.S. at 195 (citing ***Monsanto***, 467 U.S. at 1016–20).

This step in the Court's reasoning is beset with problems too. First, the pages cited from ***Monsanto*** do not refer to using Tucker Act litigation to ripen a takings claim; in fact, they specifically state that it is FIFRA's negotiation/arbitration process that ripens a claim for later Tucker Act litigation. *See* ***Monsanto***, 467 U.S. at 1018 ("precondition to a Tucker Act claim").

Second, the statement literally makes no sense. Takings claims against the federal government must be brought under the Tucker Act, and needless to say they must be ripe when brought. So this enigmatic statement seems to envisage a ripe, and yet somehow not truly ripe, Tucker Act claim failing on the merits in federal court and thereby somehow ripening a later, identical Tucker Act claim that will enter the federal court through the front door while the first Tucker Act claim is being ushered out the back door. How could that possibly be? Litigation under the Tucker Act is the congressionally mandated means to *resolve* such takings claims; it does not *ripen* those claims, least of all so that the same litigation can be played out all over again in federal court with a retread of the first, failed Tucker Act claim.[3]

Having begun to blur the distinction between ripening a claim and judicially resolving it, and on that basis having established, to its own satisfaction at least, a role for federal courts in ripening takings claims, the *Williamson County* Court next turned its attention to the ripening role of state litigation.

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[3] NELF is not the first to notice the circularity of the Court's statement. *See* Michael M. Berger, *Anarchy Reigns Supreme*, 29 Wash. U. J. Urb. & Contemp. L. 39, 57–58 (1985) ("The Court cannot have meant what it said. . . . Use of the Tucker Act is not a *prerequisite* to another remedy, it *is* the remedy.") (original emphasis); Brief Amici Curiae for Elizabeth J. Neumont et al., 2005 WL 176429, at 12, *San Remo Hotel LP v. City and County of San Francisco*, 545 U.S. 323 (2005) (No. 04-340) (absurd to say that "an owner's Tucker Act suit for just compensation would be 'premature' until the property owner had brought a Tucker Act suit for just compensation"). The Court's statement would make perfect sense in the context of *Monsanto* itself if "FIFRA" were substituted for the "Tucker Act," for FIFRA's negotiation/arbitration process may be a prelude to a claim against the federal government, as we have noted. But we have also observed that the process is fundamentally dissimilar to the state litigation requirement in that it only fixes the extent of a taking and is not judicial. The nonsensical substitution of the Tucker Act for FIFRA is an indication of how badly *Monsanto* had to be distorted to support *Williamson County's* reasoning.

II. The *Williamson County* Court Failed To Adhere To Its Own Distinction Between Final Decision-Making That Ripens A Claim And Remedial Court Proceedings That Resolve A Claim.

The Court next presented a second illustration of ripening, this one dealing with takings claims brought against a state entity rather than against the federal government. We now come to the foundational statement of the state litigation requirement.

> Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Williamson County, 473 U.S. at 195. In the following paragraph, the Court restated this key point:

> [B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

Id. Before a federal claim can be brought in federal court, therefore, the Court held that takings claims must be ripened by state litigation. Pointing out that Tennessee law permits inverse condemnation actions to be brought in state court for takings claims, the Court ruled that the bank "has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its [federal] taking claim is premature." *Id.* at 196–97.

While this chain of reasoning does not suffer from the circularity of the earlier statement about Tucker Act claims, it now completely blurs the distinction between what courts do and what local state agencies, boards, commissions, counties, and municipalities do when the latter take and do not justly compensate. *See* Michael M. Berger and & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-parody Stage*, 36 Urb. Law. 671, 695 (2004) (original emphasis) ("[T]he festering problem at the core of *Williamson County* is ***blurring the state legal system with the local agency defendant*** . . . .").[4]

Oddly, at the conclusion of its discussion of the final decision-making requirement for ripening a claim, the *Williamson County* Court drew a distinction between that requirement and a requirement to exhaust remedies.

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at

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[4] Arguably, underlying that "festering problem" is a more fundamental one, i.e., the Court's confusion of the just compensation that the county did not pay with the money damages the bank was required to seek from the state court as remedy for that failure to pay just compensation. *See infra* pp. 15–23.

> a definitive position on the issue that *inflicts an actual, concrete injury*; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and *obtain a remedy* if the decision is found to be unlawful or otherwise inappropriate.

473 U.S. at 193 (emphasis added).

To clarify the distinction, the Court noted that while the final decision rule required the bank in *Williamson County* to follow procedures for obtaining variances to determine definitively the extent to which its land development would be curtailed by local regulations, the bank "would not be required to exhaust" remedial procedures for its 42 U.S.C. § 1983 takings claim. *Id.*

> While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, . . . respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are *remedial*.
>
> . . . .
>
> Resort to those procedures would result in a *judgment* whether the Commission's actions violated any of respondent's *rights*. In contrast, resort to the procedure for obtaining variances

> would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed.

Id. (emphasis added).[5]

Thus the Court recognized a critical distinction, one to which it failed to adhere a page later. Final agency decision-making is a "conclusive determination" of the extent to which the government would allegedly take; it occurs outside of court and, if unaccompanied by just compensation, it "inflicts an actual, concrete injury." By contrast, if a court reviews such a decision, the proceeding is a remedial one, wherein "rights" are settled by a "judgment" and a "remed[y]" is given. Plainly, the former proceeding ripens a claim, and the latter resolves it; the difference is categorical.

Unhappily, the Court immediately set about undermining that difference. When the Court turned to a "second reason the taking claim is not yet ripe," it did a volte-face, for there we are told, as we have seen, that the second reason the bank's claim remained unripe was that the bank had not sought a *remedy* in state court.[6] *Id.* at 194–97. *See*

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[5] We note that, on the facts of *Williamson County* itself, the bank had no need for variances from the new regulations because it had prevailed in the lower courts on its argument that it had only ever been lawfully subject to the old regulations. *See Williamson County*, 473 U.S. at 182–84.

[6] In a footnote the Court justified this inconsistency on the grounds that takings claims are unique, an explanation that rests on the erroneous assumption that just compensation is denied, and the associated takings claim becomes ripe, only

—*continued on next page*—

also City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710 (1999) ("Damages for a constitutional violation are a legal remedy."). In other words, the state litigation requirement gives to a state court's *remedial* proceedings the same power to ripen a federal takings claim as that possessed by the final agency decision that "inflicts [the] actual, concrete injury" by taking without just compensation. Essentially, the ***Williamson County*** Court treated a state court's final judgment denying money damages as if it were simply the judicial analog of the local government's failing to pay just compensation. Just compensation or compensatory damages—the Court saw no real difference. *See* ***Williamson County***, 473 U.S. at 195 n.14 ("Nor has the Court ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation.").

Expressed more exactly, ***Williamson County*** confuses a local government entity's denial, as party defendant, of any liability to pay compensation with a state court's judgment as adjudicator of the dispute between the local government entity and the property owner. As pled by the bank, it was the county's denial as taker and as party defendant that created the violation of the Takings Clause, i.e., "inflict[ed] an actual, concrete injury." For similar reasons, the Court's reference to "the State's action" not being "complete" until the "State" fails to provide adequate compensation for the taking by a court judgment compounds the confusion. It was not the

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once a money damages remedy has been denied by a court. *See* 473 U.S. at 494 n.13. For the underlying confusion between just compensation and a money damages remedy, see *infra* pp. 15–23.

"State," no more than it was the state court, whose actions were alleged to have taken the property interest of the bank, and it was not the "State," no more than it was the state court, that refused to pay just compensation; it was the county and the organs of county government that did both.

By veering from the sound, fundamental distinction it articulated just moments before, the Court unwittingly put in place an erroneous ripening requirement that would prove to be the graveyard of countless takings claims. Unlike the final decision-making requirement, state litigation culminates in a final judgment, which implicates the claim-extinguishing principles of claim and issue preclusion and the Full Faith and Credit statute (28 U.S.C. § 1738). That fact should have raised a red flag alerting the Court that it was not laying down a procedure for ripening a takings claim for federal litigation, but rather for extinguishing it. A state court judgment denying a plaintiff relief on a state takings claim adds nothing to the ripeness of a federal claim, and in fact, under *Williamson County*, it imperils such a claim.

During oral argument in *San Remo Hotel, LP v. City and County of San Francisco*, 545 U.S. 323 (2005), Justice Sandra Day O'Connor said:

> [F]rankly, it isn't clear to me that the Court ever contemplated just cutting off any determination in Federal court of takings claims in the way that it seems to work out by application of *Williamson County*. . . . So now we're faced with the consequences of that, and it looks to me like the lower courts have run pretty far with *Williamson*

> *County*. So what's a takings claimant supposed to do?[7]

It is clear to NELF what this Court should do. *Williamson County* confuses both the "State" and the state courts with the local agencies, boards, commissions, towns, etc., that make the only decisions that count for ripeness, i.e., the final decision to take and the decision not to pay just compensation. It also muddles the huge, legally consequential difference between local government's refusal to pay just compensation and a state court's final judgment not to award a damages remedy for an alleged taking. *See infra* pp. 15–23. This Court should therefore abandon the state litigation ripening requirement. It was ill supported and badly reasoned, and its effect on the defense and vindication of constitutionally protected property rights has been uniformly pernicious.

III. *Williamson County*'s Reasoning Stems From A Confusion That Has Developed In Takings Law.

As we have suggested, underlying the *Williamson County* Court's reasoning is a confusion between the just compensation owed by government and a money damages remedy awarded by courts. These are not the same, and *a fortiori* neither are government's refusal to pay just compensation and a state court's denial of a money damages remedy to a property owner on a takings claim. Once these distinctions become blurred, all "post-deprivation" state procedures that involve money start to look a lot alike, as they apparently did to the ***Williamson County*** Court.[8] ***See*** J. David Breemer, ***Dying on the Vine: How a Rethinking of "Without Just Compensation" and Takings Remedies Undercuts*** Williamson County's ***Ripeness Doctrine***, 42 Vt. L. Rev. 61, 66 (Fall 2017).

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[7] Transcript of Oral Argument, *San Remo Hotel LP v. City and County of San Francisco*, 545 U.S. 323 (2005) (No. 04–340), available at http://www.scotussearch.com/casefiles/719#1 (last accessed April 30, 2018).

Payment of just compensation has long been recognized by this Court to be a ***limiting condition*** placed by the Fifth Amendment on the power of government to take private property for public use.[9]

> Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power.

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[8] But the Court also found support in a post-deprivation due process case where the issue did not center on a failed obligation to pay money. 473 U.S. at 195 (discussing ***Parratt v. Taylor***, 451 U.S. 527 (1981)). Admitting in a footnote that the analogy was an "imperfect" one, the Court sought refuge once again, ***see supra*** n.6, in the "special nature" of just compensation, ***see*** 473 U.S. at 195 n.14.

[9] The Fifth Amendment applies to state governments through the Fourteenth Amendment. ***See Penn Central Transp. Co. v. City of New York***, 438 U.S. 104, 122 (1978) (citing ***Chicago, B. & Q. R.R. Co. v. City of Chicago***, 166 U.S. 226 (1897)).

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 314 (1987).[10]

It follows that when the condition of paying just compensation is fulfilled, the taking is lawful and inflicts no injury. *See Williamson County*, 473 U.S.

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[10] *See also Murr v. Wisconsin*, 137 S. Ct. 1933, 1950–51 (2017) (Roberts, C.J., dissenting) (Takings Clause places "condition" of just compensation on government's power to interfere with property rights); *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S.Ct. 1409, 1409–10 (2016) (Thomas, J., dissenting from denial of certiorari) (citing *First English*); *Kelo v. City of New London*, 545 U.S. 469, 496 (2005) (O'Connor, J., dissenting); *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003) (Fifth Amendment "imposes two conditions on the exercise" of taking power—public use and just compensation); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) ("[J]ust compensation . . . conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs."); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923) (just compensation "condition of the taking"); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 305 (1923) ("A necessary condition of the taking is the ascertainment and payment of just compensation."); *United States v. Lynah*, 188 U.S. 445, 471 (1903) (just compensation limitation imposed on power to take by Fifth Amendment); *Chicago, B. & Q. R.R. Co. v. City of Chicago*, 166 U.S. 226, 238 (1897) ("condition precedent to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner"); *Searl v. School Dist. No. 2*, 133 U.S. 553, 562 (1890) ("[Eminent domain] cannot be exercised except upon condition that just compensation shall be made to the owner[.]"); *United States v. Jones*, 109 U.S. 513, 518 (1883) (compensation requirement "is no part of the [eminent domain] power itself, but a condition upon which the power may be exercised"); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (Marshall, C.J.) (Takings Clause "a limitation on the exercise of power by the government").

at 195 n.13 ("no constitutional violation occurs until just compensation has been denied"); ***Monterey***, 526 U.S. at 710, 718 ("The constitutional injury alleged, therefore, is not that property was taken but that it was taken without just compensation. . . . Simply put, there is no constitutional or tortious [§ 1983] injury until the landowner is denied just compensation."). Hence, it is not any sort of remedy.

In contrast to the payment of just compensation, payment of money damages is the remedy given by a court when government has injured an owner by taking property without having paid just compensation. ***See Monterey***, 526 U.S. at 710 ("[I]n a strict sense [the property owner] sought not just compensation *per se* but rather damages for the unconstitutional denial of such compensation. Damages for a constitutional violation are a legal remedy.") The fact that the amount paid as just compensation and the amount recovered as money damages may be the same does not negate the legal distinction, though it has long promoted confusion between the two and a loose use of terminology. *See id.* at 718 ("[D]amages to which the landowner is entitled for this injury are measured by the just compensation he has been denied[.]"). The amount may be the same but it bears a very different legal character in the two situations for the reasons just given.

Hence, post-deprivation procedures geared to regulating the timing and manner of payment of just compensation and the ascertainment of its amount are not remedial in nature, in the sense of providing money damages for an injury as a court would. We first glimpse the ***Williamson County*** Court's confusion on this point in the following sentence:

> Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a "'reasonable, certain and adequate provision for obtaining compensation'" exist at the time of the taking.

473 U.S. at 194.

The quoted phrase is drawn the from *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 659 (1890). There the post-deprivation "reasonable, certain and adequate provision for obtaining compensation" described the kind of procedures we have just mentioned, i.e., those regulating the constitutionally permissible manner of paying post-deprivation ***just compensation*** for an acknowledged taking, when the taker stands ready, willing, and able to pay it once the amount is fixed. *See Cherokee Nation*, 419 U.S. at 643–44 (where land was taken by eminent domain, prescribed post-deprivation procedures for obtaining just compensation are "amicable" negotiations or mandatory "appraisement of three disinterested referees," with right of review by court of amount appraised). The proceedings were not concerned with establishing the why of liability, but only with the how, how much, and when of the just compensation that was to be paid. Hence, in ***Cherokee Nation*** the phrase does not mean what the ***Williamson County*** Court used it to mean, i.e., that judicial procedures for obtaining money damages when there is a disputed taking are the exact legal equivalent of provisions for being paid just compensation, or conversely that being denied money damages by a court on a takings claim is the exact legal equivalent of the taker refusing to pay just compensation in the first place. The Court's confusion is based on the unexamined and erroneous assumption that one form of "compensation" is as good as another for determining the ripeness of a claim for an uncompensated taking.

Just as the Court had to squeeze *Monsanto* to make it fit into *Williamson County*, the Court did the same when it applied to state litigation the expression "reasonable, certain and adequate provision for obtaining compensation." These terms may describe accurately *Cherokee Nation's* procedures for determining the amount of just compensation to be paid for the property taken, but when has liability litigation for money damages, with all its attendant risks, ever merited being called a "certain" method for obtaining compensation"?

This point is confirmed by another much-cited case, *Sweet v. Rechel*, 159 U.S. 380 (1895), in which there was also an acknowledged, undisputed taking authorized by legislative act, with just compensation being paid afterwards. In *Sweet*, which originated in Massachusetts, the question was what counted as a constitutionally permissible provision for being paid just compensation when it is paid post-deprivation. 159 U.S. at 400. The Court noted that the reasonable compensation required by the Massachusetts constitution was equivalent to the just compensation of the U.S. Constitution, and it proceeded to review the question first with reference to the Massachusetts constitution and then to the federal Constitution. It observed that in Massachusetts "'[p]ayment need not precede the seizure; but the means for securing indemnity must be such that the owner will be *put to no risk or unreasonable delay*.'" *Id.* at 401 (emphasis added) (quoting *Haverhill Bridge Props. v. County*

Commissioners, 103 Mass. 120, 124 (1869)). It noted further that Massachusetts requires "*prompt* and *certain* compensation," and that after valuation proceedings, the owner has an "*unqualified right to a judgment* for the amount of such damages." *Id.* at 402 (emphasis added).

Then the Court turned to the U.S. Constitution and declared, citing *Cherokee Nation*, "Substantially the same principles have been announced by this court when interpreting the clause of the constitution of the United States that forbids the taking of private property for public use without just compensation," including the principle that the amount of just compensation be "ascertained without undue delay" in post-deprivation proceedings. *Id.* at 402, 407. *See also Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923) (citing *Cherokee Nation*) ("rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain and adequate provision is made for obtaining just compensation"); 2 John Lewis, *A Treatise on the Eminent Domain in the United States* § 678 at 1163 & n.50 (3rd ed. 1909) (citing numerous cases, including *Cherokee Nation* and *Sweet*) (emphasis added) (just compensation need not precede entry, provided "some definite provision is made whereby the owner will *certainly* obtain compensation").[11]

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[11] "It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of *just compensation* is satisfied when the public faith and credit are pledged to a *reasonably prompt ascertainment and payment*, and there is *adequate provision for enforcing the pledge*." *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677

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Clearly, a statute permitting an owner to litigate liability in the hope of winning money damages for an uncompensated taking is not the kind of "provision" that could be reasonably described by any of the terms quoted approvingly in *Sweet* ("certain," "no risk," "prompt," etc.), as the history of modern regulatory takings cases bears out only too well.

Unfortunately, just as an earlier rule that payment of just compensation should precede or coincide with a taking yielded to the more practical rule that there must at least be in place at the time of the taking an "adequate provision" for later ascertaining and obtaining *just compensation* promptly and with certainty, so toward the end of the 19th Century courts laxly came to view laws allowing for recovery of a *money damages remedy* through post-deprivation suit as "provision[s]" of the same kind as that described in *Cherokee Nation*. *See* J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 219-25 (Spring 2003). *See also* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 109-115 (1999). In addition to the courts' not infrequent failure to distinguish carefully between just compensation and a money damages remedy when

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(1923) (emphasis added) (citing *Sweet* among other sources). In *Joslin*, a statute made payment guaranteed and prompt in a number of ways. *See* 262 U.S. at 677–78.

they clearly intend only the former,[12] the 1887 passage of the Tucker Act likely encouraged federal courts, including this Court, to slip into this new way of viewing "compensation." *See* Breemer (2003), *supra*, at 222.

The confusion about what counts as a post-deprivation "adequate provision" for obtaining just compensation reached its destructive apogee once it became the basis of a ripeness requirement in ***Williamson County***. Relying on an inapt quotation from ***Cherokee Nation***, the Court mistakenly treated liability adjudication for a money damages remedy as just another procedure by which the "State" may give just compensation to a takings plaintiff. As a result, the requirement that plaintiffs litigate liability in state court has led, time and again, to a premature demise of their federal claims. This case provides the Court with an opportunity to dispel the confusion and to end the injustice.

CONCLUSION

For the reasons stated above, the Court should announce the abandonment of the state litigation ripening requirement set out originally in this Court's decision in ***Williamson County***.

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[12] ***See, e.g., Bauman v. Ross***, 167 U.S. 548, 599 (1897) (if "damages" not paid, title remains in owners, because they cannot be "compelled to part with their lands without receiving just compensation").

Respectfully submitted,

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June 5, 2018

No. 17-647

In The

Supreme Court of the United States

◆

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, et al.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

◆

BRIEF OF THE OHIO FARM BUREAU FEDERATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

◆

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INTEREST OF AMICUS CURIAE[1]

The Ohio Farm Bureau Federation ("OFBF") is Ohio's largest general farm organization, with a core purpose of working together for Ohio's farmers and a mission of creating a partnership between farmers and consumers. OFBF is a federation of 86 county farm bureau organizations, representing all 88 counties in Ohio, and has more than 140,000 member families. OFBF constitutes the twelfth largest state farm bureau federation.

OFBF members own and rent substantial amounts of land throughout the state of Ohio and use it to produce virtually every kind of agricultural commodity found in that area of the country. Ohio's number one industry remains food and agriculture, and OFBF supports farmers of all types and sizes of farms in an industry that contributes billions of dollars each year to Ohio's economy. OFBF is strongly committed to protecting the private property rights preserved by the U.S. Constitution, as it has done for more than 90 years. OFBF regularly monitors and participates in pending cases, like this one, that significantly impact its members.

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[1] All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

Farmers and their land are all too often the target of eminent domain activity and, unfortunately, subject to unconstitutional takings made without payment of just compensation. Thus, as farmers, OFBF's members generally have a strong interest in overturning this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), which forces private landowners to run through a gauntlet of state court litigation to enforce their property rights as guaranteed under the U.S. Constitution. As ***Ohio*** farmers, OFBF's members' interest in overturning *Williamson County* is especially strong, because Ohio law does not recognize a claim of inverse condemnation and forces landowners to engage in an even more tortured, costly, and delay-prone state process to attempt to obtain just compensation for an unconstitutional taking of their property.

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SUMMARY OF ARGUMENT

The *Williamson County* state-litigation ripeness requirement has unintended impacts on property owners asserting Fifth Amendment just compensation claims. *Williamson County* shunts them to state court to first ripen their claims, resulting in piecemeal litigation, delay, cynical gamesmanship by the condemnor, and increased costs for attempting to vindicate one's property rights as compared to other constitutional rights. Moreover, through *Williamson County*'s interaction with the doctrines of claim and issue preclusion, plaintiffs will likely find that ripening their claims in state court has a preclusive effect in federal court.

The Court's misguided *Williamson County* decision has severely injured farmers, especially in physical takings cases where a farmer must engage in years and years of litigation to obtain just compensation while the state physically occupies her most valuable asset—her land. Without a guarantee of attorney's fees, as there would be in federal court, a single farming family may find it difficult to afford representation to vindicate their rights in state court. *Williamson County* affects Ohio farmers particularly severely due to the multi-step, grueling mandamus process in place in Ohio. This multi-step process, and the cost that a farmer would incur as a result, means many farmers will never bring their claims through the courthouse door, and their rights will be trampled upon indefinitely. Although other briefs before this Court elaborate more fully on the inherent legal flaws in the *Williamson County* decision or the untenable results of this Court's *San Remo* decision, this brief highlights eminent domain litigation involving Ohio farmers—such as the decades of litigation related to ***State ex rel. Doner v. Zody***, **958 N.E.2d 1235 (Ohio 2011)** and ***State ex rel. Coles v. Granville***, **877 N.E.2d 968 (Ohio 2007)**—to illustrate the concrete harms the *Williamson County* state-litigation requirement has inflicted on private landowners. *See infra* § C.1-2 for a detailed discussion of the *Doner* and *Coles* cases.

The *Doner* example exposes the need for a federal forum to prevent eminent domain abuse by state actors. In *Doner*, in accordance with the *Williamson County* ripeness requirement, over eighty farmers brought their federal takings claims in the Supreme Court of Ohio against the state for its frequent, severe and inevitably recurring flooding of their farms, which had substantially destroyed the value of the farms. After several years of litigation, the farmers received an extraordinary writ of mandamus (after being forced to meet a clear and convincing evidence standard) to compel the state to initiate appropriation proceedings to pay just compensation. The state did not comply, however, forcing the farmers to return to the Supreme Court of Ohio, reopen the mandamus case, and seek an extraordinary remedy of contempt (also under a clear and convincing evidence standard). The court held the state in contempt, and once again ordered the state to file the appropriation proceedings. The state then filed separate actions against each of the farmers and took every opportunity to further delay those proceedings, relitigating multiple issues from the mandamus action, and appealing the same issues in every case. Six years after the Supreme Court of Ohio issued its writ, only five out of fifty farm families had received their constitutional right to just compensation. By then eight of the farmers had died without receiving a penny in just compensation.

Only after the remaining farmers brought First and Fifth Amendment retaliation claims (a straightforward Fifth Amendment claim was unavailable due to *Williamson County*) in federal court against the state and its officials did their right to just compensation get resolved. Phillis, Michael, *Flooded Landowners Sue Ohio for Retaliating Against Them* (April 14, 2017), *available at* https://law360.com/articles/913585. Cases like *Doner* embody why members of this Court question the state-litigation requirement and have argued that it should be reexamined. *See Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348-52 (2005) (Rehnquist, C.J., concurring).

Where *Doner* highlights the harms of closing the federal courthouse doors to landowners, the *Coles* case reflects the tension between federal and state courts created by the *Williamson County* state-litigation requirement. In *Coles*, Ohio farmers turned to the federal courts when the Ohio state-court mandamus process proved unresponsive, inefficient, and costly. In that case, state actors had intentionally delayed initiating appropriation proceedings in a fifteen-year struggle over the state actors' taking of private property for a bike path. While the state actors' conduct "stunned and appalled" the federal district court, the court found that a "wait-and-see approach" would be appropriate under *Williamson County*—even though the dispute had been "percolating and bubbling away for 15 years." Applying *Williamson County*, the Sixth Circuit agreed with the district court that despite fifteen years of a physical taking without just compensation, *Williamson County* required a "wait-and-see approach." Thus, the farmers remained without recourse in federal courts for their federal takings claims, and were forced to proceed in state court where, like *Doner*, the state actor went after the landowners, one at a time, to relitigate numerous issues from the mandamus case in each and every separate appropriation action.

These cases exemplify the morass *Williamson County* has caused by relegating the basic human right to just compensation for government seizures of private property to an inferior status, where they must be handled by state courts through state procedures. *See* Br. Am. Cur. for the American Farm Bureau Federation and National Cattlemen's Beef Association, in which amicus here concur. For over 116 years, after the ratification of the Fourteenth Amendment, the just compensation clause was not relegated to inferior status. Respectfully, the time has come to return the just compensation clause to its rightful place—co-equal with the other basic rights recognized in the United States Constitution. Citizens like Ohio farmers deserve this Court restoring this basic right to its rightful place.

As such, the *Williamson County* ripeness requirement should be overruled.

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ARGUMENT

A. Contrary to the Purpose and Intent of 42 U.S.C. § 1983, *Williamson County* Leaves Enforcement and Protection of the Fifth Amendment to States and Creates an Unnecessary Procedural Morass.

Generally, no requirement mandates that a litigant exhaust any state procedure prior to asserting a constitutional claim under 42 U.S.C. § 1983 in federal court. In fact, "this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position. . . ." *Patsy v. Bd. of Regents*, 457 U.S. 496, 500-01 (1982). The very purpose of § 1983 was "to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered the deprivation of constitutional rights." *Id.* (quoting Cong. Globe, 42d Cong., 1st Sess., 376 (1871)). By enacting § 1983, Congress chose to "interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Id.* (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

Absent *Williamson County*, if a state actor takes property without providing just compensation in violation of the U.S. Constitution, a landowner, or group of landowners, would be able to assert an inverse condemnation claim in federal court under § 1983. A single federal court would be tasked to first decide, under a preponderance of the evidence standard, whether there had been a taking. *Wilson v. United States*, 350 F.2d 901, 908 (10th Cir. 1965). Then, the same court would determine the extent of the taking. Finally, the court would oversee jury trials to determine just compensation. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 711 (1999) (finding that a plaintiff is entitled to a jury trial for a § 1983 action seeking redress for an uncompensated taking). In other words, a single judge, under a single continuous case number, would preside over the entirety of the landowners' case, ensuring consistency, a fair application of the law of the case, and normal case management procedures to prevent delay. *See id.* This system leaves the injured party, the landowner, in the driver's seat as the plaintiff. Finally, a prevailing landowner would be entitled to attorney's fees. 42 U.S.C. § 1988(b).

However, the *Williamson County* court held that property rights are somehow different than or inferior to other rights, and owners must seek and be denied just compensation in state court prior to suing for an unconstitutional taking in federal court. *Williamson Cty. Reg'l Planning Comm'n*, 473 U.S. at 194-96. The disparate impacts and unintended consequences of what initially appeared to be a relatively straightforward ripeness requirement, however, have become clear in the more than thirty years since the *Williamson County* decision. Under *Williamson County*, a plaintiff who wishes to assert her federal takings claim in federal court will be forced to undergo a two-step process even under the most perfect of circumstances: first, she must ripen her claim in state court, and, if denied just compensation, then she must litigate the unconstitutional taking in federal court.

The *Williamson County* state-litigation requirement has resulted in a procedural morass that condemnors exploit for gamesmanship purposes. For example, when a plaintiff files her takings claim in state court in order to ripen the claim, she faces the risk that the defendant will remove the matter to federal court based on federal question jurisdiction, leaving both the plaintiff and the courts perplexed. *See, e.g.*, *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 625 (5th Cir. 2003) (holding that district court lacked jurisdiction to consider unripe removed federal takings claim). An additional detrimental effect of the *Williamson County* state-litigation ripeness requirement is that a plaintiff might be forced to proceed in federal court and state court simultaneously. For example, there are no ripeness requirements for public use, unreasonable seizures, and un-subsumed due process claims related to an uncompensated taking, so a plaintiff may be forced to ripen a just compensation takings claim in state court while simultaneously litigating the related ripe claims in federal court. *See Carole Media Ltd. Liab. Co. v. N.J. Transit Co.*, 550 F.3d 302, 309 (3d Cir. 2008) ("*Williamson County* does not apply to claims under the Public Use Clause."); *Brown v. Metro. Gov't of Nashville & Davidson Cty.*, No. 11-5339, 2012 U.S. App. LEXIS 14553, at *11 (6th Cir. Jan. 9, 2012) ("the *Williamson County* ripeness framework for Takings Clause claims does not apply to Fourth Amendment claims"); *Bowlby v. City of Aberdeen*, 681 F.3d 215, 226 (5th Cir. 2012) (declining to apply *Williamson County* to a procedural due process claim).

Moreover, due to the doctrines of claim and issue preclusion, piecemeal litigation is likely the least of the plaintiff's concerns. Following this Court's ruling in *San Remo*, the Full Faith and Credit statute often prohibits federal courts from hearing a federal takings claim after a plaintiff unsuccessfully litigates for just compensation in state court. *San Remo Hotel, L.P. v. City & Cty. of S.F.*, 545 U.S. 323, 336 n.16 (2005); *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409, 1410 (2016) (Thomas, J., dissenting from denial of cert.) ("*San Remo Hotel* dooms plaintiffs' efforts to obtain federal review of a federal constitutional claim even after the plaintiffs comply with *Williamson County*'s exhaustion requirement."). "The rules thus operate to ensur[e] that litigants who go to state court to seek compensation [under *Williamson County*] will likely be unable later to assert their federal takings claims in federal court" due to *San Remo*. *Arrigoni Enters., LLC*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.) (internal citation marks omitted). Thus, by ripening her federal claim in state court, a plaintiff erects a potentially preclusive barrier to federal court review of her federal takings claim.

Therefore, following *Williamson County*, even assuming a perfect state process, a plaintiff is almost guaranteed multiple actions, longer litigation, and procedural confusion. When there is a less than perfect state process, however, true injustice results. Instead of allowing a federal court to "interpose" itself "between the States and the people" to guard "the people's federal rights," *Patsy*, 457 U.S. at 500-01 (quoting

Mitchum, 407 U.S. at 242), the *Williamson County* scheme entrusts state courts to do so, even when it involves other state actors who have already unconstitutionally taken property without paying just compensation. If state courts fail to promptly stop or punish such behavior, a federal court's hands are tied by *Williamson County*. Even when federal courts observe unreasonable delay in state-court litigation or eminent domain abuse, *Williamson County* forces them to take a "wait-and-see" approach and hope that the state courts will resolve the matter. *Williamson County* leaves open opportunity for abuse of power and a disparate impact for plaintiffs who may not have the time and resources to navigate the *Williamson County* labyrinth.

B. The Potential Harms of *Williamson County* Are Not "Potential" in Ohio and Other States That Do Not Recognize a Claim for Inverse Condemnation.

In Ohio, and in other states that do not recognize a claim for inverse condemnation, the full extent of the detrimental impacts of the *Williamson County* state-litigation requirement is evident. To seek just compensation for an unconstitutional taking of private property, Ohio law requires a landowner to file an action for an "extraordinary" writ to force a condemnor to initiate a separate appropriation action to determine the value of the taken property. *State ex rel. Doner*, 958 N.E.2d at 1247. Under the extraordinary writ standard, the landowner must prove that a taking has occurred by "clear and convincing evidence," which is a much higher standard than the "preponderance of the evidence" standard that would have otherwise been applied in federal court. *Id.* ("Parties seeking extraordinary relief bear a more substantial burden in establishing their entitlement to this relief."). Notably, a landowner who fails to meet the "clear and convincing evidence" standard could be barred from later pursuing his takings claim under a "preponderance of the evidence" standard in federal court due to claim and issue preclusion. *See San Remo Hotel, L.P.*, 545 U.S. at 347 ("we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum").

Ohio's eminent domain procedures necessarily require multiple actions and result in piecemeal litigation. If the extraordinary writ is granted, the condemnor starts a second action (often in front of a different judge) to determine the value of the appropriation. *State ex rel. Levin v. City of Sheffield Lake*, 637 N.E.2d 319, 322 (Ohio 1994) ("mandamus lies to determine if property has been appropriated and to compel initiation of statutory proceedings"). Therefore, at a minimum, to vindicate one's Fifth Amendment rights, a landowner is forced to litigate two separate actions—the mandamus action and the appropriation proceeding. *See id.*

Moreover, once the landowner is granted the writ, the mandamus case is closed and the landowner no longer has control over the eminent domain action. Instead, Ohio law allows the condemnor to prepare and initiate appropriation proceedings under a complaint and description of the taking as drafted by the condemnor. Ohio Revised Code § 163.05. After the writ has been granted, there is no active case or judicial oversight of the condemnor in its preparation and initiation of appropriation proceedings, and, as a result, condemnors do not move quickly. *See, e.g.*, *State ex rel. Doner v. Zehringer*, 982 N.E.2d 664, 664 (Ohio 2012). Although landowners often achieve a writ of mandamus in a group, condemnors file separate appropriation proceedings for each landowner, forcing landowners to litigate their claims (and any evidentiary or property law issues shared by the group) separately. *See id.*

Further complicating matters, Ohio law limits what defenses and issues a landowner may raise in response to an appropriation petition; if issues arise in the appropriation proceeding beyond the issue of just compensation, the landowner must initiate yet another action to resolve those matters. *Cincinnati v. Smith*, 29 Ohio App. 2d 172, 173, 279 N.E.2d 638, 639 (Ohio Ct. App. 1971) ("if the landowner wanted to raise questions other than a determination of the amount of compensation and damages to which he is entitled, such questions would have to be determined in a separate action to enjoin the proceeding"). Additionally, there is no guarantee that a landowner will be able to recover attorney's fees for either the mandamus action or the appropriation action, even if the landowner prevails. *City of All. v. Whinery*, Case No. 2000CA00137, 2000 Ohio App. LEXIS 5252, at *11 (Ohio Ct. App. Nov. 13, 2000).

Shunting landowners to Ohio state court means that many landowners lacking the wherewithal to vindicate their Fifth Amendment constitutional rights give up. Unless the value of the appropriated property is exceedingly high or unless there are multiple landowners subject to the same taking who can combine resources for the initial mandamus proceedings, Ohio's multi-step process—coupled with the lack of any guarantee of attorney's fees—makes litigation in Ohio courts too costly and precludes many landowners from seeking just compensation at all. In these instances, the state continues to trample on the constitutional right to just compensation. The Ohio farmers that do not give up then face the devastating impacts of trying to run the *Williamson County* gauntlet.

C. *Williamson County* Has a Particularly Devastating Impact on Ohio Farmers.

The *Williamson County* state-litigation ripeness requirement disproportionally impacts farmers. Many farmers are "land rich and cash poor." ***Broaddus v. United States Army Corps of Eng'rs***, 380 F.3d 162, 172 n.9 (4th Cir. 2004) (describing family farmers as "land rich but cash poor" and noting that their "land is committed to an ongoing use as part of the farming enterprise"). In an uncompensated physical takings case, the government occupies the farmer's most valuable asset—without having paid compensation—for the duration of the eminent domain litigation. Under *Williamson County*, the farmer must fund costly piecemeal litigation first in state court and then in federal court. And without any guarantee of attorney's fees for the state court litigation, a single farmer may not be able to find representation to vindicate her rights. While piecemeal litigation is undesirable for any litigant, the cost and delay of multiple lawsuits—through either simultaneous or consecutive state and federal court actions—can be devastating for farmers deprived of the source of their livelihood.

Ohio's eminent domain laws compound these issues for Ohio farmers. Ohio farmers forced to assert their federal takings claims in state court are subjected to Ohio's heightened burden of proof, two-step mandamus process, and condemnor-friendly presumptions and are thereafter barred from asserting their claims in federal court under the federal standards due to the doctrines of issue and claim preclusion. The *Doner* case and the *Coles* case best illustrate the negative impacts that *Williamson County* has had on Ohio farmers.

1. *State ex rel. Doner v. Zody*

The *Doner* case is but one example of the difficulties caused by the *Williamson County* state-litigation requirement and the devastating impact it has had on Ohio farmers' ability to assert their Fifth Amendment rights. In *Doner*, over 80 farmers in Mercer County, Ohio brought suit in 2009 against the Ohio

Department of Natural Resources ("ODNR"), asserting that ODNR took their land by its frequent, severe and inevitably recurring flooding of thousands of acres of farmland as the result of a redesigned spillway. *Doner*, 958 N.E.2d at 1239. ODNR had been warned repeatedly by landowners and local government officials that the proposed redesign of the spillway would cause severe flooding to land downstream, but ODNR "made a conscious choice to disregard that foreseeable risk in favor of recreational users of the lake and landowners on the southern end of the lake." *Id.* at 1250. Due to ODNR's actions, the farmers' properties "flooded more frequently, over a larger area, for longer periods of time and with greater resulting damage, including crop loss, the deposit of silt, sand, stone, and other debris, drainage-tile failure, soil compaction, and the destruction of trees, bushes, and shrubs." *Id.* at 1241. Such flooding substantially destroyed the value of the farms. *Id.* at 1248, 1252.

After nearly two years of extensive discovery (requested by the state), substantial briefing, and the presentation of evidence, the Supreme Court of Ohio unanimously granted the writ of mandamus, compelling ODNR to immediately commence appropriation proceedings. *Id.* at 1252. The Supreme Court of Ohio denied the landowners' request for attorneys' fees. *State ex rel. Doner v. Logan*, 131 Ohio St. 3d 1455, 961 N.E.2d 1134 (Ohio 2012).

ODNR intentionally delayed filing the appropriation actions. Nine months after that order was issued, ODNR had filed only two of the over fifty compensation cases that needed to be filed. *State ex rel. Doner*, 982 N.E.2d at 664. Because Ohio law does not afford for ongoing judicial oversight of the relief granted by the writ, i.e., the condemnor's filing of the appropriation proceedings, ODNR's delay tactics forced the farmers to reopen the mandamus case and file a motion to show cause as to why ODNR should not be held in contempt of the Supreme Court of Ohio's writ of mandamus. *Id.* The Supreme Court of Ohio held ODNR in contempt and ordered ODNR to file all appropriation cases within 120 days. *Id.*

Once Ohio law granted ODNR control of the litigation, ODNR split apart the group of farmers that had been granted the writ, and forced them to litigate their appropriations proceedings separately. This splintering drove up the cost of litigation, required each landowner to fight anew the legal battles their neighbors had won in separate trials, and resulted in delay.[2] *See, e.g., State v. Ebbing*, 28 N.E.3d 682 (Ohio Ct. App. 2015); *State v. Knapke*, 33 N.E.3d 528, 541 (Ohio Ct. App. 2015); *State, Dep't of Nat. Res. v. Mark*

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[2] As noted above, Ohio's eminent domain statutes provide no process for addressing eminent domain abuses within an appropriation proceeding. *See Cincinnati v. Smith*, 29 Ohio App. 2d 172, 173, 279 N.E.2d 638, 639 (Ohio Ct. App. 1971). Thus, when ODNR refused to make required deposits to secure their possession of the farmers' property, the *Doner* farmers were forced to obtain two more additional writs compelling the state to do so. *See, e.g., Ohio ex rel. Karr Revocable Tr. v. Zehringer*, No. 10-13-2018, 2014-Ohio-2241, ¶ 36, 2014 Ohio App. LEXIS 2186 (Ohio Ct. App. May 27, 2014). This provides just another example of how *Williamson County* forces landowners into state processes rife with the potential for delay and eminent domain abuse.

L. Knapke Revocable Living Tr., 28 N.E.3d 667 (Ohio Ct. App. 2015); *State, Dep't of Nat. Res. v. Thomas*, 79 N.E.3d 28 (Ohio Ct. App. 2016). Litigating against each farmer in a separate action permitted ODNR to relitigate the same issues in each jury trial and delay subsequent trials by appealing each verdict, often to the Supreme Court of Ohio. *Dep't of Nat. Res. v. Ebbing*, 39 N.E.3d 1270 (Ohio 2015); *Ohio Dep't of Nat. Res. v. Knapke*, 41 N.E.3d 447 (Ohio 2015); *Dep't of Nat. Res. v. Knapke Tr.*, 37 N.E.3d 1249 (Ohio 2015); *Dep't of Nat. Res. v. Thomas*, 72 N.E.3d 658 (Ohio 2017). Litigating each case one-by-one also allowed ODNR to "shift[ ] strategies" by raising new issues in each subsequent jury trial, and then appealing those new issues as well. *Thomas*, 79 N.E.3d at 46. The years of machinations, delays with each successive appeal of the jury verdicts, and deprivation of just compensation ended for eight of the farmers who died before ever receiving a penny for state's flooding of their farms. Complaint, *Kuhn v. Zehringer*, Case No. 2:17-cv-00315-MHW-EPD, ECF No. 1, ¶ 16 (August 13, 2017 S.D. Ohio).

All of these issues could have been avoided if the federal courthouse doors had been open to the *Doner* farmers to vindicate their Fifth Amendment rights from the start. The *Doner* farmers should have been permitted to utilize § 1983 to bring a single federal action for a Fifth Amendment violation under § 1983, where they would remain plaintiffs throughout, their claims would remain under the constant supervision of a single federal judge, and the law of the case would require fair and consistent treatment to them all.

These problems exemplify the constitutional infirmities of *Williamson County*.

The end of the *Doner* litigation only highlights the importance of federal courts in resolving unconstitutional takings by a state actor. After only five cases were tried and only five families received just compensation after roughly eight years of state court litigation, the farmers sued ODNR in federal court, alleging First and Fifth Amendment retaliation claims. While the *Williamson County* state-litigation requirement prevented the farmers from asserting their Fifth Amendment just compensation claims in federal court, it served as no bar to their retaliation claims once the continuing conduct of the state rose to the extreme-level of conduct necessary for such retaliation claims. Demonstrating the important role that federal courts must play in vindicating property rights, the dispute between ODNR and the farmers resolved shortly after the landowners were finally let in the federal courthouse doors. It is unfortunate, and improper, that the farmers were not let in those courthouse doors years earlier.

2. *State ex rel. Coles v. Granville*

The *Coles* case is yet another example of *Williamson County*'s procedural morass in Ohio. In *Coles*, a group of farmers and other landowners in Erie County, Ohio brought suit against the park district for taking approximately six miles of private property to build a bike path but refusing to pay just compensation for that taking. *State ex rel. Coles*, 877 N.E.2d 968. The farmers first filed a civil-rights action in federal district court in 2003, arguing that the park district violated their Fifth and Fourteenth Amendment rights when it invaded and took complete control and possession of their land nearly four years earlier. *Coles v. Granville*, No. 3:03 CV 7595, 2005 U.S. Dist. LEXIS 893 (N.D. Ohio Jan. 24, 2005). Two and a half years later, the district court dismissed the case. *Id.* at *4. The Sixth Circuit affirmed the dismissal in 2006, holding that the takings claim was unripe. *Coles v. Granville*, 448 F.3d 853, 865 (6th Cir. 2006). The Sixth Circuit found that Ohio had a "reasonable, certain, and adequate provision for obtaining compensation," therefore, the farmers had to go through the state-court mandamus process before bringing their federal claims in federal court. *Id.* at 861.

In 2006, the farmers turned to state court to vindicate their constitutional rights by requesting a writ of mandamus to compel appropriation proceedings. *State ex rel. Coles v. Granville*, 877 N.E.2d 968 (Ohio 2007). The Supreme Court of Ohio granted the writ of mandamus in 2007 (again under a clear and convincing evidence standard). *Id.* at 978. The farmers hoped that the nearly ten years of litigation was drawing to a close, that the park district would diligently proceed with the steps necessary to appropriate the farmers property, and that the park district would pay the farmers the long-overdue just compensation to which they were entitled. *See* Motion for Contempt filed Dec.

4, 2009, *State ex rel. Coles v. Granville*, Case No. 2006-1259, 10 (Ohio).

The park district, however, delayed filing the appropriation proceedings. *Id.* Over a year after the writ had been granted, the park district still had not filed any appropriation proceedings. Due to the park district's inaction, the farmers returned to federal court to seek relief for their federal takings claim. Complaint, *Coles v. Granville*, Case No. 3:08-cv-02968-JGC, ECF No. 1 (N.D. Ohio 2008). In the federal action, the park district repeatedly denied the farmers' ownership over their property—attempting to relitigate the issue—and criticized the Supreme Court of Ohio's decision granting the farmers a writ of mandamus. *Id.* at ECF No. 15 at ¶¶ 13-17; ECF No. 22 at 5 n.2, 12, 14. Only in response to the summary judgment briefing in the federal court action and in an effort to moot the federal takings claim, the park district filed appropriation proceedings in 2009. *See* Motion for Contempt, *State ex rel. Coles v. Granville*, Case No. 2006-1259, 18 (Ohio Dec. 4, 2009).

In the appropriation proceedings, the park district repeatedly took positions contrary to the Supreme Court of Ohio's decision granting the writ of mandamus. *Id.* at 19. For example, despite the Supreme Court's ruling granting the farmers the writ, the park district claimed that the farmers were not entitled to any just compensation and forced the farmers to relitigate their established right to just compensation. *Id.* As a result of the separate mandamus and appropriation actions required under Ohio law, the farmers were forced to reopen the mandamus action in the Supreme Court of Ohio and file a motion to hold the park district in contempt of the Supreme Court of Ohio's order granting the writ of mandamus. *Id.*

In light of the farmers' effort to obtain the extraordinary sanction of contempt in state court, the federal court stayed the federal proceedings pending action from the state court. *Coles v. Granville*, Case No. 3:08-cv-02968-JGC, ECF No. 50 (N.D. Ohio 2008). The federal court, however, noted its clear amazement at the conduct of the park district:

> I want to say as candidly and as forthrightly as I can, that ***I am stunned and appalled*** at the failure of the Metroparks board to have acted with far greater dispatch in filing the appropriation proceeding. ***This dispute has been percolating and bubbling away for 15 years.*** Plaintiffs represent that they have spent over a million dollars trying to get that to which the law quite clearly entitles them, just compensation.

Id. (emphasis added). The farmers appealed the district court's order indefinitely staying their civil rights action. The Sixth Circuit affirmed, and cited the *Williamson County* standard to find that the district court properly "took a wait-and-see approach." Order, *Coles v. Granville*, Case No. 10-3259, ECF No. 25 at 2 (6th Cir. June 4, 2010). Even though the court was "stunned and appalled" by the park district's actions and its fifteen-year ongoing battle against just compensation, its hands were tied by *Williamson County*.

Thus, Ohio farmers are barred from entering the federal courthouse doors at the outset to assert their Fifth Amendment rights, and then are barred from entering the federal courthouse doors after a state acknowledges but refuses to timely vindicate those Fifth Amendment rights—all because of *Williamson County*.

D. There Is No Plausible Basis for Applying a Ripeness Requirement to Fifth Amendment Takings Claims Alone.

Courts should not apply a state-litigation ripeness requirement to Fifth Amendment takings claims. As set forth above, there is generally no requirement that a litigant assert their constitutional claims under § 1983 in state court before seeking relief from a federal court. *Patsy*, 457 U.S. at 500-01. Thus, "*Williamson County* has downgraded the protection afforded by the Takings Clause to second-class status." *Arrigoni Enters., LLC*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of cert.). There is no reasonable justification for treating Fifth Amendment takings claims any differently from other constitutional claims.

The *Williamson County* court initially reasoned that the ripeness requirement was appropriate because "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State. . . ." 473 U.S. at 195. Yet, a taking of private property without just compensation is complete when the property is taken and just compensation is not paid by the condemnor. Indeed, this Court recognizes the just compensation requirement as "self-executing." *United States v. Clarke*, 445 U.S. 253, 257 (1980). Just compensation need not be denied by a court, let alone a state court, prior to a claim becoming ripe.

In light of the inequitable[3] impacts that the *Williamson County* state-litigation requirement has had on farmers—and Ohio farmers specifically—it must be overruled. *See also* Br. Am. Cur. for the American Farm Bureau Federation and National Cattlemen's Beef Association. Of overarching concern is the condemnors' abuse of the state-court mandamus process with no federal judicial oversight, including the procedural gamesmanship, incessant relitigation of issues, and unnecessary delay.

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[3] Beyond the lack of any justifiable reason to relegate property rights to an inferior status as compared to other rights, *Williamson County*'s inequitable outcomes violate the very nature of the just compensation requirement. *See United States v. Fuller*, 409 U.S. 488, 490 (1973) (that "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law") (internal citations omitted); *see also United States v. Lee*, 360 F.2d 449, 452 (5th Cir. 1966) ("'Just compensation' invokes the equitable powers of the court").

CONCLUSION

In sum, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK,
Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD, FRANKLIN KOTTSCHADE, PEYMAN PAKDEL, AND SIMA CHEGINI AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims, as suggested by Justices of this Court? *See Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of certiorari); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 348 (2005) (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in judgment).

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INTEREST OF *AMICI CURIAE*[1]

All of the *amici curiae* here have experienced first hand the procedural gauntlet created by *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The primary purpose of this brief is to make sure that the Court understands that the conflicts and confusion created by *Williamson County* are not simply the stuff of law review articles and rarefied judicial debates on jurisdictional ripeness. This issue has real world consequences. It affects families, businesses, and livelihoods – including many people who are not large developers. Indeed, all of the *amici* spent (or face the prospect of spending) years trying to overcome the virtually insurmountable hurdles that *Williamson County* has erected for Takings plaintiffs. Despite good faith attempts to comply with this Court's ripeness requirements, they have been relegated to a procedural purgatory. Unless this Court reverses *Williamson County*, it will simply be impossible for Takings plaintiffs like *amici* to obtain a federal court decision on the merits of their federal constitutional claims.

San Remo Hotel, L.P., Thomas Field, and Robert Field (all referred to as the "Field Brothers") spent twelve years of litigation bouncing between the state and federal courts – all without ever obtaining a federal court determination of the merits of their Takings claim. Mr. Kottschade spent eight years litigating in state and federal courts -- again without obtaining a federal court determination of his Takings claim.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing via blanket consents filed with the Clerk's Office.

Mr. Pakdel and Ms. Chegini started just one year ago in their effort to obtain a federal court determination of their Takings claim. The district court followed *Williamson County* and determined that their Takings claim should be decided in the state courts. Mr. Pakdel and Ms. Chegini are appealing to the Ninth Circuit. *Pakdel v. City and County of San Francisco*, No. 17-17504.

The interest of the Field Brothers and Mr. Kottschade in this case is not obvious. The Field Brothers lost their state law claims, and never received a federal court determination of their Takings claim due to this Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005). Mr. Kottschade was more fortunate – after an eight-year effort to obtain a federal court determination of his Takings claim, Mr. Kottschade and the City of Rochester finally settled on the eve of trial in the Minnesota state courts.

The Field Brothers and Mr. Kottschade do not have a live Takings Claim that could be affected by the Court's ruling in *Knick*. Nor do they currently expect any government to take any more of their property. Nevertheless, they have agreed to pay half of the attorneys' fees for this brief because they want this Court to understand that *Williamson County* has adverse consequences that severely affect any property owner whose property is taken by the government. To this day, the Field Brothers and Mr. Kottschade believe that the government took their property in violation of the Fifth Amendment. Whether their belief is right or wrong, the rule created by ***Williamson County*** condemned their claims to a litigation quagmire. When combined with the decision in ***San Remo Hotel***, the federal courthouse doors have been slammed shut to Takings plaintiffs.

Not only do property owners have little political clout to protect themselves from governmental actions, many of them are small business owners (or just homeowners, like Mr. Pakdel and Ms. Chegini) with relatively limited resources to litigate a Takings case against the government. Moreover, closing the door to the federal courts is not a minor impediment to the vindication of this right. It is an obstruction that undermines the primary purpose of the Fifth Amendment: to protect individual property owners from the unfettered actions of governments.

Almost by definition, governments do not take property from a majority: a suburban town does not take every single-family home in town and a city does not take every downtown office building. Instead, governments take property from a politically powerless minority – and governments do so for a politically popular purpose – whether that purpose is affordable housing, new and better roads, open space, etc. It is all too easy for legislators to impose exactions on a few property owners, rather than explain tax increases to all of the voters. The protection of minorities from majority rule animates the purpose of both the Fifth Amendment and the jurisdiction of the federal courts. After all, judges in the 39 states where judges stand for election and must answer to the same citizens that elected the legislators who decided to take the property in the first place.

The Field Brothers and Mr. Kottschade could simply rely on the institutional *amici*, who will surely file briefs in this case. Instead, they want this Court to understand that those institutional briefs complaining about *Williamson County* are not raising theoretical concerns and are not speaking about issues that only concern wealthy, corporate developers. Instead, this is a real problem that affects individual citizens and small businesses. The Field Brothers and Mr. Kottschade have decided to spend money on this brief to make sure that the Court considers their experiences in deciding this issue.

The litigation gauntlets endured by the Field Brothers and Mr. Kottschade should stop all but the most foolish (and confident) Takings plaintiffs from following in their footsteps. Their participation as *amici* in this case is in the hope that their litigation sagas play a role in persuading this Court to overrule *Williamson County* so that future Takings plaintiffs have an opportunity to present their constitutional claims in the federal courts.

By contrast, the interest of Mr. Pakdel and Ms. Chegini is obvious. They are out-of-state residents who asserted a Takings claim against a San Francisco ordinance that required them to grant a life tenancy in the home that they plan (or, rather, planned) to live in when they retire. Their claim was dismissed by the district court based on *Williamson County*. They have an appeal pending in the Ninth Circuit, which would be decided in their favor if this Court reverses *Williamson*

County. In that event, they would be able to pursue their Takings claim in the federal courts – as would have been their right with any other federal constitutional claim. Their hope is that they can have that adjudication, rather than simply surrendering their fate to the California state courts. In order to advance their own case, they are paying half the cost of this brief.

SUMMARY OF ARGUMENT

This Court should overrule *Williamson County* for two reasons.

First, the decision was badly reasoned and it undermines the fundamental purpose of the Fifth Amendment: "to bar Government from forcing some people alone to bear public burdens which, in all fairness, should be borne by the people as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The fundamental premise of *Williamson County* was that once a Takings plaintiff has been denied compensation by the state courts, that plaintiff would have a ripe federal constitutional claim. But, this Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) undermines that fundamental premise of *Williamson County*.

Second, the past thirty years of experience with the actual operation of the litigation gauntlet created by *Williamson County* shows that the rule is unworkable. The experiences of *amici* demonstrate that the path to a federal court decision on a Takings claim is very long and expensive. But, more importantly, their experiences show that *Williamson County* slammed shut the federal courthouse doors on Takings plaintiffs. The consequence of shutting the federal courthouse doors is to make this Court the only federal court with clear jurisdiction to participate in the evolution of Takings law. That was not the intent of the *Williamson County* ruling and demonstrates its unworkability.

ARGUMENT

I. The Field Brothers Proved, the Hard Way, that a Takings Plaintiff Cannot Obtain a Federal Court Decision on the Merits of a Takings Claim

After a three-year process in its administrative agencies, San Francisco reinstated the Field Brothers' historical right to rent the San Remo Hotel rooms to tourists on a daily basis – but only if they paid an exaction in the amount of $567,000 to be used for affordable housing programs.

In 1993, the Field Brothers filed suit in the District Court for the Northern District of California, alleging a Takings claim. The district court ultimately dismissed the Takings claim as unripe based on *Williamson County*. In 1998, the Ninth Circuit affirmed that decision. *San Remo Hotel, L.P. v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998).

In 1998, the Field Brothers filed suit in state court – with an express reservation of their federal Takings claim for subsequent adjudication in federal court. The state trial court rejected their state law claims for compensation. The California Court of Appeal reversed that decision. In 2002, the California Supreme Court reversed the Court of Appeal, expressly acknowledging the reservation of the federal Takings claim. *San Remo Hotel, L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 649, n.1, 689 and 704 (2002).

In 2003, when the Field Brothers returned to the federal courts, the district court and the Ninth Circuit found that the California Supreme Court decision on the state law claims barred the federal Takings claim. Finally, in 2005, this Court upheld that decision. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005).

II. Kottschade Shows that the Path of a Takings Plaintiff is Long and Hard – Even to Reach a Settlement

After a nine-year odyssey through the administrative process to obtain a building permit, Mr. Kottschade finally obtained a permit and filed suit in the District Court for the District of Minnesota in 2001. He alleged that the permit conditions were exactions that violated the Takings Clause and he sought just compensation. In 2002, the district court dismissed the federal case, holding that Mr. Kottschade's claims were not ripe because he had not sought compensation in the state courts as required by *Williamson County*.

Mr. Kottschade appealed to the Eighth Circuit, which affirmed the district court decision based on *Williamson County*. Anticipating that result, Mr. Kottschade asked the Eighth Circuit to hold that an adverse state court decision would not bar him from filing a subsequent Takings claim in federal court. The Eighth Circuit was sympathetic, stating that his "suggestion has the virtue of logic and is tempting." *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041

(8th Cir. 2003). However, the Eighth Circuit held that the effect of claim or issue preclusion should not be decided until after the state court proceedings were completed. *Id.* at 1042. This Court denied Mr. Kottschade's *certiorari* petition. 540 U.S. 825 (2003).

After several years of negotiations, Mr. Kottschade filed suit in state court in 2006. The state trial court granted Rochester's motion for summary judgment based on a statute of limitations defense. Mr. Kottschade successfully appealed to the state appellate court, which found that his claims were not time barred.

In 2009, on the eve of trial in the state court, Mr. Kottschade and Rochester reached a settlement. Since there never was a final decision in the state court, there was also no decision about the effect of an adverse state court judgment on his Takings claim. Of course, there also was no federal court determination on the merits of his Takings claim.

Although Mr. Kottschade finally reached a settlement, his litigation path was long, difficult, and needlessly expensive. Not only was he required to litigate his case, he also decided to advance his personal litigation by joining in *amicus* briefs filed in this Court in support of *certiorari* and on the merits in *San Remo Hotel*; and in support of *certiorari* in *Braun v. Ann Arbor Charter Township*, No. 08-250.

III. Pakdel and Chegini Have Just Started to Follow in the Footsteps of San Remo and Kottschade

Mr. Pakdel and Ms. Chegini filed their complaint alleging a Takings claim in the District Court for the Northern District of California in 2017. The district court promptly dismissed their Takings claim based on *Williamson County*. The opening brief for their appeal to the Ninth Circuit was just filed in April 2018. Thus, they are at the very beginning of the litigation ordeal created by *Williamson County*.

IV. *Amici* All Had or Have Constitutional Claims that Deserve Consideration by a Federal Court with an Article III Judge

Of course, the merits of *amici*'s claims are not relevant to this case, but a brief description of their Takings claims shows that they are serious constitutional claims worthy of consideration by the federal courts. After all, the federal courts have Article III judges, who are protected (at least after appointment) from political pressures. By contrast, many state courts judges have no such protection and must stand for election. That is true of the judges in California and Minnesota, as well as in 37 other states around the country. Brennan Ctr. For Justice, *Judicial Selection: An Interactive Map*, http://judicialselection map.brennancenter.org (visited 6/2/18). As a result of *Williamson County*, Takings plaintiffs face a judiciary that is subject to the same political pressures as the state and local legislators who adopted the laws that resulted in the alleged Takings. Of course, the whole point of the Bill of Rights is to protect minorities from the improper exercise of governmental power, which is exercised in response to the wishes of the majority.

A. San Remo Hotel Challenged San Francisco's Residential Hotel Ordinance

The San Remo Hotel was built after the 1906 earthquake by A.P. Giannini, the founder of Bank of America. The Field Brothers purchased the San Remo Hotel in 1971. By that time, it had become dilapidated. The Field Brothers devoted considerable effort and completed a restoration of the hotel in 1976. San Francisco granted them a hotel license, which authorized unlimited tourist use of the hotel.

In 1979, San Francisco adopted the Residential Hotel Unit Conversion and Demolition Ordinance. San Francisco Administrative Code § 41. In short, it provided that any hotel rooms that had been occupied by the same person for at least 32 days as of September 23, 1979 would be designated a residential room. During the tourist season, those rooms could be rented on a daily basis to tourists; but during the rest of the year, those rooms must be rented by the week or by the month.

The ordinance was intended to protect affordable housing in San Francisco and effectively reserve space for the homeless. That is a politically important issue today and it was similarly important in 1979. The same is true of the political popularity of saddling a few hotel owners with the costs of housing the homeless rather than raising taxes. Of course, San Francisco understood that it was imposing a significant economic cost on the owners of these newly designated residential hotel rooms. As a result, it allowed owners to escape the regulations, but at a price: 40% of the cost of constructing new housing to replace the hotel rooms that had been designated as residential units.

Over time, the ordinance was amended to make it more onerous. In 1990, the ordinance was amended to severely restrict the allowable tourist use of rooms designated as residential hotel rooms and to increase the exaction imposed for changing the designation from 40% to 80% of the cost of constructing new housing. The exaction was imposed because adequate public funding for affordable housing was no longer available. San Francisco Admin. Code § 41.3. In 1990, the Field Brothers applied and, in 1993, their historic right to rent rooms to tourists on a daily basis was restored. The Board of Supervisors imposed an exaction in the amount of $567,000. One dissenting Supervisor called the exaction "organized extortion".

The owners of hotels subject to this regulation are a very small subset of the hotel industry in San Francisco and had little political power. By contrast, there was great popular appeal of a regulation that preserved housing for low income residents and only imposed the consequences on that small group of hotel owners. In the political process, there was no contest.

B. Kottschade Challenged Onerous Conditions Imposed on His Development Permit

Mr. Kottschade was born and raised on a farm near Rochester. He has lived in Rochester since 1965 and raised his family there. He did construction work to pay for his college education. Eventually, he made his career as a realtor and home builder.

Mr. Kottschade purchased a parcel of land in Rochester for development purposes in 1992. From 1992 to 2001, he went through multiple proposed development applications. At one point, Rochester imposed a condition requiring him to create a man-made lake. On its face: a nice (albeit expensive) addition to his development plans. The only wrinkle: the Minnesota Department of Natural Resources refused to issue the necessary permits to create the lake.

By 2001, Rochester issued a final decision granting a permit to develop the property, but it imposed myriad, onerous conditions. Among the conditions was a requirement that he widen an adjacent public road and install ponds for regional storm water management. The net economic effect of the exactions was to reduce the number of townhomes that he could build from 104 units to 26 units, which increased the development cost of each home from $22,000 to $90,000 per unit.

Mr. Kottschade challenged the conditions on the ground that they were unconsitutional exactions. As this Court has held, exactions imposed as conditions of a development permit must be based on an "individualized determination" of the impacts caused by the development, and the government must prove both an "essential nexus" and "rough proportionality" between the development's impact and the imposed exaction. *Nollan v. California Coastal Commission* 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)

Like the ordinance San Francisco imposed on the San Remo Hotel, the type of conditions imposed on Mr. Kottschade are popular: voters like free road widening and free stormwater management much more than higher taxes. By contrast, a single home builder does not have the political clout to prevent government from singling them out to bear burdens that should be shared by all taxpayers.

C. Pakdel and Chegini Are Challenging a Lifetime Lease Requirement

Mr. Pakdel and Ms. Chegini live in Akron, Ohio. They want to live in San Francisco when they retire. They bought an apartment in a six-unit building in San Francisco with the plan of renting it to a tenant until they are ready to retire. San Francisco has very strict limits on the conversion of apartment buildings into condominiums or coops. The primary purpose of those restrictions is to minimize the conversion of rent-controlled units into owner-occupied units. As a result, a new form of ownership developed, known as TICs (tenants in common). TICs are units in apartment buildings (typically 2-6 units) which are owned by multiple owners. Typically, there is a TIC agreement between the owners of all of the units that is designed to mimic the obligations of the owners of a condominium or coop building.

When Mr. Pekdal and Ms. Chegini bought their TIC in 2009, San Francisco allowed TIC buildings with 2-6 units to convert to condominiums – by complying with a number of restrictions and then participating in a lottery allowing the conversion of no more than 200 units per year. Mr. Pekdal and Ms. Chegini were parties to a standard TIC agreement requiring all of the owners to participate in an application to convert to condominiums as soon as it was legally allowed, i.e., when they won the lottery.

San Francisco changed the conversion rules in a very important way in 2013: owners of 2-6 unit buildings were still allowed to convert to condominiums, but they were required as a condition of the conversion to grant a lifetime lease to any existing tenants. San Francisco Subdivision Code § 1396.4(g). At first blush, this seems similar to many rent control ordinances, but there is a critical difference: this requires the owner to grant a real property interest to the tenant. By contrast, rent control ordinances restrict the owner's right to terminate a month-to-month tenancy, but they do not create a long-term tenancy. Restricting the grounds for termination may have the real world effect of extending the tenancy for a long time. However, most rent control ordinances do allow some ability to terminate rent controlled tenancies for reasons such as the owner's intent to move into the property themselves. Moreover, rent control ordinances are subject to amendment, but once a lifetime lease is granted to a tenant it is beyond the control of amendments to the rent control ordinance.

As a result of their contractual commitment to the other TIC owners in their building, Mr. Pekdal and Ms. Chegini made an offer of a lifetime lease to their tenant, who is much younger than they are. He accepted that offer. Their plan to live in that unit after they retire has been dashed by the change in the ordinance.

Again, as with the Field Brothers and Mr. Kottschade, the condominium conversion ordinance is very popular with the voters (and their elected officials) because it protects tenants from property owners. In San Francisco political campaign mythology, all tenants are poor, innocent victims oppressed by rich, evil landlords. The few TIC owners with tenants did not stand a chance at the Board of Supervisors. And, as non-residents, Mr. Pakdel and Ms. Chegini do not even have the right to vote in the election of one of the eleven Supervisors. The only protection of their rights can come from the courts.

V. The Fifth Amendment Protects Property Owners from Oppressive Actions by the Majority

These governmental schemes suffered by *amici* show that the political process cannot protect small groups of property owners from popular measures. The whole point of the Bill of Rights is to establish rights that are not subject to infringement by a majority – certain rights are to be protected regardless of the popularity of any particular infringement on those rights. Of course, in the context of Takings law, there is often a delicate question to draw the line between a regulation that is within the proper exercise of the state's police powers and a regulation that goes too far.

E.g., *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). But, the difficulty and delicacy involved in drawing such lines highlights the need for federal courts to be able to decide on the outer limit of the police power.

The point of describing *amici*'s Takings claims is not to persuade this Court of the merits of any of those claims. Rather, the purpose is to show that state court judges, who are not protected by Article III, are not the best deciders of these issues.

Of course, one of the important premises of the federal court's jurisdiction over federal questions is to enable plaintiffs (and defendants) to choose the federal courts to decide federal questions – that takes the questions out of the hands of politically motivated state court judges and into the hands of Article III judges. Even if the state court judges are fair, federal court jurisdiction is an important bulwark to insure that parties can choose to avoid the state courts – and their perceived unfairness.

The purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness, should be borne by the people as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960) In the Field Brothers' case, the California Supreme Court split 4-3, with Justice Janice Rogers Brown pointing out in dissent:

> But private property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal regime where the nominal owner of property must use

> that property according to the preferences of the majorities that prevail in the political process—or, worse, the political powerbrokers who often control the government independently of majoritarian preferences.

San Remo Hotel, 27 Cal.4th at 692.

San Francisco is a peculiar case, even in California. Because San Francisco is the only combined city and county in California, the local judges are elected by precisely the same citizens who vote in the elections for Mayor, Board of Supervisors, and local initiatives. By contrast, other cities in California are located in counties with multiple cities, where judges are elected by county-wide vote. Thus, the popularity of a measure in a particular city matters less to a judge standing for election based on votes from the entire county.

Again, the point of this discussion is not to litigate the fairness of the San Francisco courts. Instead, the purpose is to use it as an example (perhaps an extreme example) of the reasons that Takings claims are deserving of consideration by federal judges who are constitutionally protected from political pressures.

VI. There is no Sound Rationale for the Rule in *Williamson County* and *Amici* Have Proven that it is Unworkable

The fatal flaw of *Williamson County* is that it treats the Takings Clause as a "poor relation" of the other rights secured by the Bill of Rights. (See *Dolan*, 512 U.S. at 392 ("no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth, should be relegated to the status of a poor relation"). There is no good reason for that difference. In fact, the origin of the *Williamson County* decision is completely unclear: it appears to have been manufactured from whole cloth.

Professor Jesse Choper's theory in the 1980s was that several of the Court's Takings decisions could be explained as being part of a strategy devised by one or more members of the Court who were concerned that deciding regulatory Takings cases on the merits might result in precedent that would be difficult to overturn later. Professor Choper's theory was that those members of the Court were advocating one procedural ruling after another (regardless of the coherence of the decision) as a way to defer the creation of merits decisions until their views of Takings law were embraced by a majority. That theory explained *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), in addition to *Williamson County*. This Court expressly noted those prior cases in *Williamson County*: "The Court twice has left this issue [when state laws are regulatory takings beyond the police power] undecided. Once again, we find that the question is not properly presented, and must be left for another day." *Williamson County*, 473 U.S. at 185.

The correctness of Professor Choper's theory is unimportant. The fact that he proposed such a theory is evidence of *Williamson County*'s lack of doctrinal coherence, which has been roundly criticized by many commentators. RS Radford and Jennifer Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under Williamson County Has Yet to be Made*, 67 Baylor L. Rev. 568, 570, n. 11 (2015) (collecting critiques). As Radford and Thompson point out, "the reasoning behind *Williamson County* is opaque". *Id.* at 572.

While the Court's reasoning was opaque, one of its critical assumptions is clear throughout the opinion: once the state courts have made final determinations refusing to provide compensation, plaintiffs would be free to seek a federal court determination of their takings claim. ***Williamson County*, 473 U.S. at 185, 186, 197, 200. For example, the opinion expressly** states that the "property owner cannot claim a violation of the Just Compensation Clause until it has used the [state court] procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195.

The opinion in *Williamson County* did not even mention the possible application of *res judicata* or collateral estoppel. Those consequences were not considered because the dispositive rule was first proposed in one of the last briefs filed in that case. Radford and Thompson, 67 Baylor L. Rev. at 574-575, 583. This Court's decision in *San Remo Hotel* demonstrates the importance of *res judicata* and collateral estoppel to any consideration of the implications of the *Williamson County* decision. The lack of such consideration is one of the reasons that the decision was wrong.

The net result of *Williamson County* and *San Remo Hotel* is that this Court has created a special rule for Takings plaintiffs – in complete disregard of the "unflagging obligation" of the federal courts to exercise the jurisdiction assigned to them by Congress. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810 (1976).

CONCLUSION

Amici recognize that this Court is extremely reluctant to overrule its own decisions, and rightfully so. As Chief Justice Rehnquist explained, "Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted). But, "[*s*]*tare decisis* is not an inexorable command"; thus, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Id.* at 827-828. As stated by Justice Brandeis, the Court "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 407-408 (1932) (dissenting).

Williamson County cries out for reversal. The decision was badly reasoned. The rule of law it created has been proven unworkable, as shown by the experiences of *amici* described in this brief.

Amici respectfully submit that the Court should overrule its decision in *Williamson County*.

Respectfully submitted,

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No. 17-647

In The
Supreme Court of the United States

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ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

◆

BRIEF OF *AMICI CURIAE* TAKINGS AND FEDERAL COURTS SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, listed in the appendix to this brief, are academics who focus their teaching and research on takings and/or federal courts law.[2] Their principal interest in this case is in the proper application of the law.

◆

SUMMARY OF ARGUMENT

The question presented in this case is whether a property owner may file a federal taking claim in federal court without first seeking compensation under state law in state court. This brief responds to two points in the United States' brief as *amicus curiae*. The Solicitor General suggests that the Court should exercise jurisdiction over petitioner's state-law inverse-condemnation claim under 28 U.S.C. § 1331. The Court should reject this suggestion. This case is not in the "special and small category of cases" in which a state-law cause of action is held to "arise under" federal law. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013) (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)).

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for any of the parties authored any part of this brief, and no person or entity other than the counsel and *amici* submitting this brief has made any monetary contribution to the preparation or submission of this brief.

[2] The views expressed by *amici* are their own and do not reflect the views of their employers.

The Solicitor General also raises the possibility that petitioner may pursue a claim directly under the Fourteenth Amendment in federal court. The Court should not decide this complex question here because it was not aired in the lower courts and because Pennsylvania law provides petitioner a statutory cause of action to recover compensation. *See* 26 Pa. Cons. Stat. Ann. § 502(c) (2006). If the Court opts to address this issue, it should hold that petitioner may not pursue a cause of action directly under the Fourteenth Amendment. Implying a cause of action under Section 1 of the Fourteenth Amendment would conflict with Section 5, which delegates authority to enforce the Amendment to Congress. Even if Section 1 provides a cause of action in some circumstances, it does not in cases like the one at bar in which state law provides an adequate means of redress.

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ARGUMENT

I. THE DISTRICT COURT CANNOT EXERCISE JURISDICTION OVER A STATE-LAW INVERSE-CONDEMNATION CAUSE OF ACTION UNDER 28 U.S.C. § 1331.

The Solicitor General suggests (U.S. Br. 22-27) that the district court should exercise jurisdiction over petitioner's potential state-law inverse-condemnation cause of action under 28 U.S.C. § 1331.[3] This argument attempts to circumvent the holding in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985), that a property owner may not bring a federal taking claim against a municipality without first seeking compensation available under state law. The Solicitor General argues (U.S. Br. 7) that *Williamson County* applies only to claims under 42 U.S.C. § 1983, leaving federal courts free to exercise jurisdiction over state-law causes of action under 28 U.S.C. § 1331.

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[3] Petitioner did not allege jurisdiction over any state-law claim under Section 1331. *See* Pet. Br. 12, 27; *see also Merrell Dow*

Section 1331 grants district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." This Court has "disclaimed the adoption of any bright-line rule" to govern Section 1331. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 317 (2005). Instead, Section 1331 is interpreted "with an eye to practicality and necessity," *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 20 (1983), "in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959), *superseded by statute on other grounds*, 45 U.S.C. § 59.

Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.").

A state law cause of action may "arise under" federal law for purposes of Section 1331 only in a "special and small category of cases." *Gunn*, 568 U.S. at 258 (quoting *Empire Healthchoice*, 547 U.S. at 699). "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 813. Rather, that narrow category is limited to cases in which "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314; *see also Gunn*, 568 U.S. at 258.

This case does not meet that test. First, this is not a case in which "the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Merrell Dow*, 478 U.S. at 808 (quoting *Franchise Tax Board*, 463 U.S. at 9). Title 26 of the Pennsylvania statutes, the Eminent Domain Code, provides a detailed and comprehensive procedure for property owners to obtain compensation for any condemnation of property. *See* 26 Pa. Cons. Stat. Ann. § 102 (2006). Petitioner may claim compensation in state court under 26 Pa. Cons. Stat. Ann. § 502(c) (2006). *See Cowell v. Palmer Twp.*, 263 F.3d 286, 290 (3d Cir. 2001). Resolving that claim would not require resolution of any federal question or even reference to any federal case law. This case, like most takings cases against municipalities, can be and properly is resolved as a matter of state law. *See* Kathryn E. Kovacs, *Accepting the Relegation* *of Takings Claims to State Courts*, 26 Ecology L.Q. 1, 34-47 (1999).

The Solicitor General asserts that such a state inverse-condemnation action "necessarily raises a federal question because it rests on the assertion that the property owner has been subjected to a taking of his property under the Fifth Amendment." U.S. Br. 24 (internal quotation marks and citation omitted). To the contrary, under Pennsylvania law, such a claim turns on whether 1) the municipality has the power of eminent domain, 2) exceptional circumstances substantially deprived the plaintiff of the use and enjoyment of her property, and 3) the municipality's intentional action immediately, necessarily, and unavoidably damaged the plaintiff's property. *In Re Mountaintop Area Joint Sanitary Auth.*, 166 A.3d 553, 561, 562 (Pa. Commw. Ct. 2017). A survey of Pennsylvania inverse-condemnation case law reveals that Fifth Amendment and federal takings cases are rarely cited much less "necessary" to the analysis, and the Solicitor General cites no authority to the contrary. Therefore, this is not the sort of rare case in which the federal courts may exercise jurisdiction over a state law claim under Section 1331. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1570 (2016) (explaining that typically in such cases "the claim's very success depends on giving effect to a federal requirement").

Second, even if petitioner's potential state inverse-condemnation claim were to raise a federal issue, that issue would not be "substantial in the relevant sense."

Gunn, 568 U.S. at 260. Whether an issue is "substantial" in this context depends on "the importance of the issue to the federal system as a whole." *Id.* In *Gunn*, a federal patent-law issue was an element of the plaintiff's state-law legal malpractice claim. Indeed, the crux of the dispute was whether, in the absence of malpractice, the plaintiff would have prevailed in his federal patent infringement case. *Id.* at 259. Yet, the Court held that the claim did not "arise under" federal law because the federal issue was not substantial. *Id.* at 264. Allowing state courts to resolve such cases would not undermine the uniformity of federal law. *Id.* at 261. The possibility that a state court might decide a state-law claim incorrectly, the Court said, is not enough to trigger federal jurisdiction, "even if the potential error finds its root in a misunderstanding of [federal] law." *Id.* at 263. The same is true here. The run-of-the-mill municipal takings case has little bearing on the federal system as a whole, but the scope and consequences of municipal regulation are of tremendous import to state and local governments.

Contrary to the Solicitor General's representation (U.S. Br. 24), in neither *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), nor *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), did the Court's decision rest on the view that the federal issue was important. Rather, the Court in *Smith* allowed jurisdiction under Section 1331 because the plaintiff's right to relief depended upon the constitutionality of a federal statute. 255 U.S. at 199, 201; *see also Gunn*, 568 U.S. at 261; *Grable*, 545 U.S. at 312;

Merrell Dow, 478 U.S. at 809 n.5 & 814 n.12. In *City of Chicago*, respondent alleged in state court that the City's landmark ordinance violated the Due Process, Equal Protection, and Just Compensation Clauses of the U.S. Constitution. 522 U.S. at 160. "[T]he federal constitutional claims were raised by way of a cause of action created by state law, namely, the Illinois Administrative Review Law." *Id.* at 164. This Court endorsed the City's removal of the case to federal court because the claims "unquestionably" arose under federal law. *Id.* Although respondent pled only a state-law cause of action, "by raising several claims that arise under federal law, [respondent] subjected itself to the possibility that the City would remove the case to the federal courts." *Id.* Thus, *City of Chicago* stands for the well-established proposition that plaintiffs cannot defeat federal jurisdiction through artful pleading that omits federal questions necessary to their claims. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998).

Third, exercising jurisdiction over state-law claims for compensation from political subdivisions of the state under Section 1331 would disturb the "balance of federal and state judicial responsibilities," *Grable*, 545 U.S. at 314, and raise federalism concerns. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law"). This Court explained in *Merrill Lynch*, that it consistently construes federal jurisdictional statutes narrowly, reflecting the Court's "deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes." 136 S. Ct. at 1573 (quoting *Romero*, 358 U.S. at 379). The Court has "reiterated the need to give '[d]ue regard [to] the rightful independence of state governments' – and more particularly, to the power of the States 'to provide for the determination of controversies in their courts.'" *Id.* (quoting *Romero*, 358 U.S. at 380). Keeping state-law inverse-condemnation claims in state courts serves to "help maintain the constitutional balance between state and federal judiciaries." *Id.*

The Solicitor General's reliance (U.S. Br. 23, 24, 25) on *Grable* is misplaced. There, an essential element of the plaintiff's state-law quiet title claim was whether the Internal Revenue Service had given the plaintiff sufficient notice of the seizure of its property under a federal statute. 545 U.S. at 315. Indeed, the construction of the federal statute was "the only legal or factual issue contested" in *Grable*. *Id.* The Court found the federal interest in adjudicating that issue strong and the potential impact on the division of labor between state and federal courts "microscopic." *Id.*

Here in contrast, there is little federal interest in adjudicating local land-use disputes. This Court has recognized that land-use regulation "is a quintessential state and local power," *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality), and "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel, L.P. v. City & Cty. of San Francisco, Cal.*, 545 U.S. 323, 347 (2005). *See generally* Kovacs, *supra*, at 38-47. Whatever federal interest there is in such cases can be satisfied by this Court's review of state court judgments. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618 (2013); *see also Merrell Dow*, 478 U.S. at 816 ("even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action").

In addition, opening the federal courthouse doors to these claims could shift the division of labor from state to federal courts markedly. Congress balanced the roles of the state and federal courts in takings cases when it enacted Section 1983. That statute makes the federal courts the appropriate forum for enforcing the Fourteenth Amendment. It does not, however, give the federal courts the authority to address non-constitutional injuries, such as the taking of property, which only violates the Constitution if the government denies compensation. *See* Resp. Br. 22-23. The Court should reject the Solicitor General's attempt to make an end-run around the issue here. "This case cannot be squeezed into the slim category *Grable* exemplifies." *Empire Healthchoice*, 547 U.S. at 701.

II. PETITIONER MAY NOT ASSERT A CAUSE OF ACTION UNDER THE FOURTEENTH AMENDMENT.

A. The Court should not address this complicated issue because an *amicus* party mentioned it for the first time in this Court.

The Solicitor General suggests (U.S. Br. 27 n.8) that it is an open question whether the Fifth Amendment provides a cause of action. The availability of an inverse-condemnation cause of action against a state or municipal government based solely on the Fifth Amendment, independent of 42 U.S.C. § 1983, however, would not assist petitioner. Such a cause of action still would be subject to the requirement that a property owner first resort to state-law compensation mechanisms, because that requirement flows from the constitutional text itself. *Williamson County*, 473 U.S. at 194. Nor does the Solicitor General affirmatively advance the argument that petitioner may assert a cause of action directly under the Fifth Amendment. Rather, the Solicitor General reiterates the argument that the federal district court may assert jurisdiction over a state-law inverse-condemnation claim under Section 1331.

The Court should not resolve this question here because petitioner did not assert a claim based on the Fifth Amendment itself, *see* J.A. 92, 93, 101 (bringing claim under 42 U.S.C. § 1983); *see also The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon. . . ."), and thus the issue was not developed in the lower courts. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (declining to address an issue of "importance" in the "absence of briefing and decisions by the courts below").

Moreover, the question of whether petitioner could assert a cause of action under the U.S. Constitution would require the Court to resolve issues that the Solicitor General does not mention. Even if the Fifth Amendment provides a cause of action against the United States, to resolve this case, the Court would have to determine further whether the Fourteenth Amendment incorporates that cause of action against the states or creates a cause of action on its own.[4] *See Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243, 247-48 (1833) (holding that the Fifth Amendment does not apply to states directly).

This Court is hesitant to create implied causes of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). In the constitutional field, there is "even greater reason" to avoid implied causes of action than in the statutory field "since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring). Implying a cause of action under the Constitution raises separation-of-powers concerns. *Ziglar v. Abbasi*, 137 S. Ct.

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[4] The Court also might have to determine whether the Fourteenth Amendment's cause of action applies to takings caused by local land-use regulations. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).

1843, 1857 (2017). This Court generally considers Congress to be the branch more suited to weighing the many factors involved in determining whether a new cause of action would serve the public interest. *Id.* at 1857-58.

Engaging in these inquiries is unnecessary here because Pennsylvania law provides petitioner a statutory cause of action to recover compensation. *See* 26 Pa. Cons. Stat. Ann. § 502(c). That statute provides a "'reasonable, certain and adequate provision for obtaining compensation,'" *see Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974)); *see also* U.S. Br. 28 n.8 ("Pennsylvania has provided a statutory cause of action that allows owners to recover the full measure of compensation required by the Fifth Amendment"), and adequate reason not to decide whether petitioner could pursue an alternate, unpled cause of action under the Fourteenth Amendment. *Cf. Ziglar*, 137 S. Ct. at 1858 ("if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action"); *Malesko*, 534 U.S. at 72 (declining to imply a right of action where "claimants in respondent's shoes [did not] lack effective remedies").

B. Petitioner cannot state a claim under the Fourteenth Amendment.

If the Court opts to address this issue, it should conclude that the Fourteenth Amendment does not incorporate or create a cause of action to seek just compensation against subdivisions of states in federal court.

If Section 1 of the Fourteenth Amendment provided a cause of action, there would be no need for Section 5, which expressly delegates to Congress the authority "to enforce, by appropriate legislation, the provisions of" the Amendment. That authority includes the power to create "private remedies against the States for actual violations" of the Fourteenth Amendment and the rights it incorporates. *United States v. Georgia*, 546 U.S. 151, 158 (2006) (concerning Eighth Amendment claim) (emphasis omitted). Section 1 should not be read to negate the plain language of Section 5 delegating enforcement authority to Congress. As the Court explained shortly after the Amendment's enactment, "[s]ome legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate . . . is brought within the domain of congressional power." *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).[5]

Congress has enacted appropriate legislation: 42 U.S.C. § 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities, secured by the Constitution and laws" of the United States. The "party injured" may bring "an action at law, suit in equity, or other proper proceeding for redress," 42 U.S.C. § 1983, against a municipality. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). This includes a property owner filing suit under Section 1983 against a local government alleging a taking without just compensation. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) (allowing claim to proceed where state law did not provide a means of obtaining compensation). In Section 1983, Congress intended to provide a federal remedy where state law was inadequate or where state law, "though adequate in theory, was inadequate in practice." *Allen v. McCurry*, 449 U.S. 90, 100-01 (1980). "In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights." *Id.* at 101.

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[5] This Court has stated that the "constitutional provision with respect to compensation" in the Fifth Amendment is "self-executing." *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304, 315 (1987). That cannot be true of the Fourteenth Amendment, however, because Section 5 expressly delegates enforcement of the Amendment to Congress.

Reading Section 1 of the Fourteenth Amendment to provide a cause of action directly would render Section 1983 superfluous and evade the requirements Congress imposed in Section 1983. Consequently, this Court has been reluctant to "imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983." *Monell*, 436 U.S. at 712 (Powell, J., concurring) (quoting *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 278 (1977)); *see also, e.g., Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400 (1979); *Aldinger v. Howard*, 427 U.S. 1, 4 n.3 (1976), *superseded by statute on other grounds*, 28 U.S.C. § 1367.

Even if the Fourteenth Amendment provides a cause of action in some circumstances, it does not do so where state law provides a "'reasonable, certain and adequate provision for obtaining compensation.'" *See Preseault*, 494 U.S. at 11 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. at 124-25). The due process component of the Fourteenth Amendment proscribes state and local government takings of private property for public use without just compensation. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 236, 241 (1897). By its plain terms, the Fourteenth Amendment's Due Process Clause prohibits states to "deprive a person of life, liberty or property without due process of law."[6]

In this case, petitioner has not been deprived of due process because state law provides an adequate avenue for her to obtain compensation for any taking that may have occurred. *Cf. Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding state action under the Fourteenth Amendment's Due Process Clause "is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy"). As the Court explained in *Zinermon v. Burch*, 494 U.S. 113 (1990), depriving a person of "'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Id.* at 125 (emphasis in original). Post-deprivation remedies satisfy due process where "they are the only remedies the State could be expected to provide." *Id.* at 128 (citing cases); *see also Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587 (1995) (holding, in the tax context, that "[a]s long as state law provides a clear and certain remedy, the States may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford postdeprivation relief (e.g., a refund)" (internal quotes and citations omitted)).

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[6] The requirement that states provide a procedure for property owners to seek compensation for takings is best seen as a procedural obligation. *See* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1110-11 (2001). The adequacy of compensation paid might implicate substantive rights. Regardless of whether petitioner's hypothetical Fourteenth Amendment claim is seen as substantive or procedural, however, a necessary component of that claim is that respondent "deprive" her of due process.

In cases seeking compensation for the effects of local land-use regulations, usually pre-deprivation process is not possible because the government will not know before enactment whether its regulation will take a particular individual's property to an extent that requires compensation. *Cf.* U.S. Br. 8-16 (arguing that the Just Compensation Clause does not require contemporaneous compensation). In this case, respondent's request for compensation is dubious. *See Brown v. Lutheran Church*, 23 Pa. 495, 500 (1854) ("the sanction of mankind in all ages . . . regards the resting-place of the dead as hallowed ground – not subject to the laws of ordinary property"); Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 B.Y.U. L. Rev. 1469 (2006). In any event, respondent effectively proffered just compensation via the Pennsylvania Eminent Domain Code when it enacted the challenged ordinance. That is all the plain language of the Fourteenth Amendment's Due Process Clause requires. *See City of W. Covina v. Perkins*, 525 U.S. 234, 241 (1999) (holding that where "postdeprivation state-law remedies [are] sufficient to satisfy the demands of due process and the laws [are] public and available, . . . the State [need not] provide further information about those procedures").[7]

◆

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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[7] The same result would obtain if the requirement for just compensation applies to states via the Privileges or Immunities Clause ("[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"). Just as respondent has not deprived petitioner of due process, so too has it not abridged respondent's privileges or immunities. The Pennsylvania compensation statute satisfies the obligations of the state and its subdivisions. *Cf.* U.S. Br. 8-16 (arguing that the Just Compensation Clause does not require contemporaneous compensation).

No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK, PETITIONER

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE STATES OF TEXAS AND OKLAHOMA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The amici States of Texas and Oklahoma (and their agencies and officials) are frequent litigants in takings cases, and property owners in the amici States sue all levels of government—federal, state, and local—seeking just compensation for takings. Since this Court's decision in ***Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City***, 473 U.S. 172 (1985), adjudication of takings cases has been complicated and prolonged when property owners seek a federal forum for resolution of their Fifth Amendment claims. The federal courts are competent to resolve claims under the Fifth Amendment when those claims are ripe for Article III and prudential purposes, and both the amici States and their citizens have an interest in efficient resolution of those claims free of the non-jurisdictional "ripeness" constraint that *Williamson County* erroneously imposed.*

SUMMARY OF ARGUMENT

I. The Court erred in ***Williamson County*** in stating that Fifth Amendment takings claims are not ripe unless and until they have been adjudicated in state court. That conclusion was not based on the doctrine of ripeness in its jurisdictional sense, and other decisions confirm that a takings claim may be ripe for Article III and prudential purposes even if a state court has not resolved it. In light of its res judicata implications, *Williamson County*'s state-litigation "ripeness" rule essentially strips federal courts of jurisdiction over specific types of claims. That result is not justified either by the decisions *Williamson County* cited or the Court's broader body of precedent.

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* This amicus curiae brief is filed with written consent of all parties as reflected on the docket.

II. The Court should overrule the challenged portion of *Williamson County*. That portion of the decision is not only erroneous, but also imposes a substantial impediment to Fifth Amendment plaintiffs' access to lower federal courts. As explained in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 326-27 (2005), that impediment arises by virtue of the full faith and credit statute, which requires federal courts to give preclusive effect to state-court judgments resulting from proceedings mandated by *Williamson County*'s state-litigation requirement. Plaintiffs in other constitutional cases do not face that barrier, and there is no sound basis to retain it in the Fifth Amendment context.

ARGUMENT

I. *Williamson County*'s State-Court Litigation "Ripeness" Requirement Is Erroneous.

When a governmental entity takes private property, the property owner's injury is not speculative. Liability arises when the government interferes with property rights, not when a court later concludes that property was taken. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 319-20 (1987); *see also Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (explaining that "[w]here the inevitability of the operation of a statute against [a takings plaintiff] is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect"). A Fifth Amendment takings claim is therefore ripe, as that term is routinely used in justiciability analysis, *see, e.g.*, *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 & n.18 (1993), regardless of whether a state court has already adjudicated such a claim.

In *Williamson County*, however, the Court used the word "ripe" in a different sense to preclude federal-court review of a Fifth Amendment takings claim before exhaustion of state-court remedies. 473 U.S. at 194. The Court has already recognized that *Williamson County*'s "ripeness" requirement "is not, strictly speaking, jurisdictional." *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 (2013) (citing *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 & n.10 (2010)). It should now recognize that imposing a state-court litigation requirement was error.

A. The plaintiff landowner in *Williamson County* sued a local land-use planning commission in federal court under 42 U.S.C. § 1983, alleging a Fifth Amendment taking based on the commission's rejection of a preliminary proposal to develop its land. 473 U.S. at 175, 182. The landowner had not requested variances from the commission, appealed the commission's decision to a zoning board of appeals, or sued under state law for inverse condemnation. *Id.* at 188.

Without reaching the question on which certiorari was granted, the Court "examine[d] the procedural posture of [the landowner's] claim" and held that the claim was not ripe for two reasons. *Id.* at 175-76, 185-86. First, the commission had denied only a preliminary proposal, and because the landowner had not sought variances from the commission, the denial was "not a final, reviewable decision." *Id.* at 186-94. Second, the landowner "did not seek compensation through the procedures [Tennessee] ha[d] provided," including litigation in state court of an inverse-condemnation claim under state law. *Id.* at 194-97.

B. Though presented as a principle of ripeness, the second element of ***Williamson County***'s reasoning did not suggest a lack of ripeness under traditional analysis of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). The first ***Williamson County*** consideration, whether the defendant has issued a final decision, 473 U.S. at 194, is alone sufficient to inform the fitness inquiry. And requiring a Fifth Amendment plaintiff to obtain a state-court judgment that will resolve the live controversy and have preclusive effect certainly imposes a "hardship," *Abbott Labs.*, 387 U.S. at 149, when the plaintiff seeks a federal forum for resolution of a federal claim. *See infra* Part II.A (discussing the combined effect of *Williamson County*'s state-court litigation requirement and the full faith and credit statute, 28 U.S.C. § 1738).

Williamson County's litigation "ripeness" requirement is more accurately described as a Court-created doctrine stripping lower federal courts of jurisdiction over Fifth Amendment takings claims for just compensation. *See, e.g.*, Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1049-1151 (6th ed. 2009) (discussing judicially developed limitations on federal-court jurisdiction). But neither the cases *Williamson County* relied on nor other decisions of this Court offer adequate support for that doctrine.

1. *Williamson County* cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and *Parratt v. Taylor*, 451 U.S. 527 (1981), as support for the state-court litigation requirement. 473 U.S. at 194-95. That reliance was misplaced in each instance.

a. *Monsanto* held that "[e]quitable relief is not available to enjoin an alleged taking of private property . . . when a suit for compensation can be brought against the sovereign subsequent to the taking." 467 U.S. at 1016. As that holding indicates, the *Monsanto* plaintiff requested equitable relief, not just compensation. *Id.* at 998-99.

Monsanto supports the proposition that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim'" for equitable relief "'against the Government' for a taking." *Williamson Cty.*, 473 U.S. at 194-95 (quoting *Monsanto*, 467 U.S. at 1013, 1018 n.21). That conclusion does not provide a basis for *Williamson County*'s litigation "ripeness" requirement for claims seeking just compensation. After all, the Court concluded in *Monsanto* that such a claim could be brought in federal court under the Tucker Act. 467 U.S. at 1017-20.

b. In *Parratt*, an inmate sued prison officials who allegedly failed to follow their own mail-distribution policies, resulting in the loss of packages containing hobby materials that the inmate had purchased. 451 U.S. at

530-31. The Court held that the inmate's due process claim was not actionable under 42 U.S.C. § 1983 because the State provided a postdeprivation remedy for the challenged "random and unauthorized act by a state employee," for which a predeprivation hearing was necessarily unavailable. *Id.* at 541, 543-44. Reasoning by analogy, ***Williamson County*** applied ***Parratt***'s holding to takings claims, concluding that a "State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" ***Williamson Cty.***, 473 U.S. at 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)).

Williamson County acknowledged that "[t]he analogy to ***Parratt*** is imperfect because ***Parratt*** does not extend to situations . . . in which the deprivation of property is effected pursuant to an established state policy or procedure, and the State could provide predeprivation process." 473 U.S. at 195 n.14. Indeed, because a taking is always the result of an established policy or procedure, a government employee's random act can never be the basis of a takings claim. *See* J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 229 (2003). For that reason, ***Parratt*** provides no support for ***Williamson County***'s litigation "ripeness" rule.

2. Other decisions of this Court confirm that *Williamson County*'s state-court litigation requirement is

neither a ripeness rule nor a valid rule limiting federal-court jurisdiction.

a. *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), illustrates the first point. If *Williamson County*'s litigation "ripeness" requirement deprived a federal district court of jurisdiction, a takings claim could not be removed to federal court before state litigation was complete because removal requires the federal court to have jurisdiction over the state-court action. 28 U.S.C. § 1441(a). But in *City of Chicago*, the Court permitted removal of a takings claim that a state court had not yet adjudicated. 522 U.S. at 164-65. That disposition was correct because the *City of Chicago* plaintiff alleged a concrete injury flowing from a final decision denying his permit applications. *Id.* at 160. Contrary to the erroneous reasoning of *Williamson County*, the takings claim was therefore ripe. *See First English*, 482 U.S. at 319-20; *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143.

b. Whenever the Court creates a rule limiting federal-court jurisdiction, it is subject to the challenge that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *see Marshall v. Marshall*, 547 U.S. 293, 298-99 (2006). But even putting that challenge aside, *Williamson County*'s state-court litigation requirement is not a valid jurisdiction-limiting rule.

In the few instances in which the Court has imposed such a rule, it has identified strong historical or federalism-based grounds. In *Ankenbrandt v. Richards*, the Court found that "an understood rule . . . recognized [since 1859]" justified its conclusion that federal courts lack jurisdiction over state-law questions of domestic relations. 504 U.S. 689, 694-95 (1992) (referencing *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858)); *see id.* at 700-03. The judicially imposed limitations on federal jurisdiction over probate matters stem from the jurisdiction of the English Court of Chancery in 1789. *Markham v. Allen*, 326 U.S. 490, 494 (1946). And the rationale for stripping federal courts of jurisdiction over matters of state taxation is based on a unique combination of history and federalism. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102-03, 107-15 (1981).

None of those grounds applies here. *Williamson County*'s state-court litigation requirement was first conceived in that case and is unrelated to any jurisdictional limitations of the Court of Chancery. And although there are some federalism concerns in the takings context, they are not nearly as strong as those the Court relied on in the state-taxation context. *See id.* at 102-03 (citing 28 U.S.C. § 1341 as evidence of congressional "recogni[tion] that the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts"). For those reasons, *Williamson County*'s requirement of state-court litigation is unjustified when viewed as what it is: a Court-imposed rule stripping lower federal courts of jurisdiction they would otherwise possess under ordinary Article III case-or-controversy principles.

II. The Court Should Overrule the Erroneous Portion of *Williamson County*.

Williamson County's litigation "ripeness" analysis has drawn criticism from several current and former Members of the Court. *E.g.*, *Arrigoni Enters., LLC v. Town of Durham*, 136 S. Ct. 1409 (2016) (Thomas, J., joined by Kennedy, J., dissenting from the denial of certiorari); *San Remo Hotel*, 545 U.S. at 351-52 (Rehnquist, C.J., joined by O'Connor, Kennedy, and Thomas, JJ., concurring in the judgment). Numerous commentators have also criticized *Williamson County*. *E.g.*, J. David Breemer, *Dying on the Vine: How A Rethinking of "Without Just Compensation" and Takings Remedies Undercuts* Williamson County*'s Ripeness Doctrine*, 42 Vt. L. Rev. 61, 62 & n.2 (2017) (collecting commentators' reactions to *Williamson County*). The question in this case is whether those or other criticisms warrant overruling the challenged portion of *Williamson County*. Pet. i.

As the Court has explained, "[r]evisiting precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). These considerations favor overruling the portion of *Williamson County* that imposed the litigation "ripeness" requirement.

A. Under 28 U.S.C. § 1738, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra* *v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). That means that claim preclusion (or "res judicata") bars federal-court litigation of any claim between the same parties that could have been raised in state court, and issue preclusion (or "collateral estoppel") bars federal-court litigation of any issue actually decided in state court. *See id.* at 77 n.1.

"[N]early every State has a compensation provision that is, or has been interpreted to be, very similar to the Just Compensation Clause" of the Fifth Amendment. H.R. Rep. No. 106-518, at 13 (2000). For that reason, takings plaintiffs who seek federal forums for their Fifth Amendment claims encounter a "Catch-22" under *Williamson County*: to ripen their federal claims, they must litigate in state court, but once they litigate in state court, the resulting decisions preclude their claims in federal court. Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches Self-Parody Stage*, 36 Urb. Law. 671, 677 (2004).

The majority opinion in *San Remo Hotel* highlights this problem, and the Chief Justice's opinion concurring in the judgment correctly identifies *Williamson County* as the obstacle to its resolution. *See San Remo Hotel*, 545 U.S. at 326-48, 348-52. As it stands, the litigation "ripeness" requirement is a significant impediment to takings plaintiffs' access to the lower federal courts—and, in some jurisdictions, to any court at all. As Justice Thomas noted in his dissent from the denial of certiorari in *Arrigoni*, "some federal judges have dismissed [takings] claims, rather than remanding them," after defendants removed suits "in state court to exhaust . . . remedies as *Williamson County* instructs." 136 S. Ct. at 1411 (citing *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006), as an example).

B. Overruling the challenged portion of *Williamson County* will neither deprive litigants of appropriate forums for resolution of Fifth Amendment takings claims nor overwhelm the federal courts. Like lower state courts, lower federal courts are fully capable of considering evidence of property value and adjudicating parties' disputes.

Some decisions have suggested that state courts are better equipped to resolve the issues that often arise in takings cases involving interpretation of municipal land-use regulations. *E.g., San Remo Hotel*, 545 U.S. at 347; *Gardner v. Mayor of Baltimore*, 969 F.2d 63, 67 (4th Cir. 1992). But the same could be said of other issues that federal courts have unquestioned competence to resolve, such as First Amendment and Equal Protection Clause challenges to the same types of regulations. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43-46 (1986); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435-39 (1985).

As the Court accurately observed in *Dolan v. City of Tigard*, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." 512 U.S. 374, 392 (1994). Because the state-court litigation requirement erroneously "downgraded the protection afforded by the Takings Clause to second-class status," *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from the denial of certiorari), and adherence to that requirement is not justified on ***stare decisis*** grounds, the Court should overrule the portion of ***Williamson County*** that imposed it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 2018

No. 17-647

IN THE

Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT and CARL S. FERRARO,
Individually and in his Official Capacity as
Scott Township Code Enforcement Officer,

Respondents.

On Writ of Certiorari to the
U.S. Court of Appeals
for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici curiae address the first question only:

Whether the Court should reconsider the portion of ***Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City***, 473 U.S. 172, 194-96 (1985), requiring property owners to exhaust state-court remedies to ripen federal takings claims.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has regularly appeared before this and other federal courts in cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g., Horne v. U.S. Dep't of Agriculture* [*"Horne II"*], 135 S. Ct. 2419 (2015); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), by requiring Takings Clause claimants to exhaust state-court remedies before filing their claims in federal court, has had the practical effect of denying them a federal forum. That result is anomalous; a federal forum is available to virtually all other claimants asserting rights under the U.S. Constitution. *Amici* believe that *Williamson County* is based on a misinterpretation of the Fifth Amendment, is inconsistent with both previous and subsequent Court decisions, and has created undue hardship for litigants seeking compensation under the Takings Clause. It ought to be overruled.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing.

STATEMENT OF THE CASE

Respondent Scott Township is a local government unit located in Lackawanna County, Pennsylvania. In 2012, it adopted an ordinance governing the operation of cemeteries and burial places within the township. Among the ordinance's provisions is a public-access provision: owners of cemeteries must keep their property "open and accessible to the general public during daylight hours." Pet. App. A-3.

Petitioner Rose Mary Knick owns 90 acres of land in Scott Township, where she and other members of her family have lived since 1970. There are no public cemeteries on the land, nor has Knick seen any signs of a burial ground. Nonetheless, in April 2013, Scott Township served her with a Notice of Violation stating that an inspection of the land revealed "[m]ultiple grave markers/tombstones" and directing Knick to come into compliance with the public-access provision by providing the general public with access to those markers during daylight hours. A second Notice of Violation, issued in October 2014, again directed Knick to "make access to the cemetery available to the public." *Id.* at 5-A.

Knick responded by filing suit in federal district court seeking relief under 42 U.S.C. § 1983, alleging *inter alia* that Scott Township had "executed an uncompensated physical invasion" of her property, in violation of the Fifth and Fourteenth Amendments. Pet. App. B-9. The district court granted Scott Township's motion to dismiss, ruling (based on *Williamson County*) that the Second Amended Complaint was not ripe for review because Knick "failed to exhaust available state law remedies" before filing suit in federal court. *Ibid.* In light of its failure-to-exhaust ruling, the court declined to address whether the complaint stated "plausible grounds for a physical invasion taking of her property without just compensation." *Id.* at B-13.

The Third Circuit affirmed, citing *Williamson County*. Pet. App. A-1 - A-33. The appeals court explained that *Williamson County* established two prerequisites for property owners seeking to assert Takings Clause claims in federal court against a state or local government:

> First, the "finality rule" requires that the government "has reached a final decision regarding the application of the regulation to the property at issue." [*Williamson County*, 473 U.S.] at 186. Second, the plaintiff must seek and be denied just compensation using the state's procedures, provided those procedures are adequate. *Id.* at 194.

Pet. App. A-20 - A-21.

The Third Circuit agreed with Scott Township that "Knick failed to comply with the second *Williamson County* prong, exhaustion of state-law compensation remedies, because Knick did not pursue inverse-condemnation proceedings under Pennsylvania's Eminent Domain Code." *Id.* at A-21, A-28. The court stated that "Knick has no surviving claim that the *taking itself* was invalid, apart from the fact that she has not received compensation. The remedy for an uncompensated (but otherwise valid) taking is compensation." *Id.* at 28a (emphasis in original). It held that Pennsylvania law provides Knick with an "adequate" procedure for seeking compensation (a state-court lawsuit under the Eminent Domain Code) and thus that *Williamson County* requires dismissal of her federal-court claim. *Ibid.*

SUMMARY OF ARGUMENT

Williamson County grounded its state-court exhaustion requirement on the language of the Fifth Amendment's Takings Clause: "[N]or shall private property be taken for public use, without just compensation." As the Court interpreted that language, no constitutional violation exists until after the relevant government body not only has taken private property but also has rebuffed all efforts by the property owner to obtain compensation for the taking. *Williamson County*, 473 U.S. at 194-197. Among the steps the property owner must take before her Fifth Amendment claims against a local government ripens: she must pursue compensation claims in state court, so long as the state courts "provide an adequate process for obtaining compensation." *Id.* at 194. If the state court awards just compensation, then no Fifth Amendment violation will ever have occurred. *Id.* at 194-95.

Williamson County was based on a clear misreading of the Fifth Amendment and ought to be overruled. The Court held, "Nor does the Fifth Amendment require that just compensation be paid in advance of, *or contemporaneously with*, the taking; all that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking." *Id.* at 194 (emphasis added and citations omitted). That holding is contradicted by strong evidence that drafters of the Fifth and Fourteenth Amendments expected that governments would, in fact, pay "just compensation" at the time they took private property. Yet *Williamson County* declares that no constitutional violation has occurred even when a local government delays paying compensation for many years while contesting state-court inverse-condemnation proceedings.

That holding makes little sense. The Constitution no doubt contemplates that just-compensation may be delayed while parties litigate over whether a taking actually occurred. But if the property owner is correct that a taking occurred, the constitutional violation dates back to the month in which the government refused to provide the requested compensation. *Williamson County's* contrary holding misreads the Fifth Amendment. And because a constitutional violation occurs on the date when the government wrongfully withholds just compensation, *Williamson County's* rationale for precluding federal-court litigation evaporates.

None of the decisions cited by *Williamson County* support its interpretation of the Fifth Amendment. Most of the cited decisions involved Takings Clause claims against the federal government. Each held that such claims must be filed in the Court of Federal Claims pursuant to the Tucker Act. But contrary to *Williamson County's* contention, 473 U.S. at 195, none of those decisions stated that the Takings Clause claims were "premature" until after the property owner files a Tucker Act claim. Lawsuits filed in the Court of Federal Claims seeking just compensation are, in fact, suits asserting violations of the Takings Clause.

Williamson County's state-court exhaustion requirement has caused undue hardship for Takings Clause claimants. The premise underlying that requirement was that such claims would "ripen" after a state-court judgment positively established that the property owner would not be receiving his requested "just compensation." But *San Remo Hotel* made clear that pursuing inverse-condemnation claims in state court has no such ripening effect. Rather, once a state court has issued a ruling denying a just-compensation claim, preclusion principles prevent the property owner from asserting Takings Clause claims in federal court. 546 U.S. at 336-38. The combined effect of *Williamson County* and *San Remo Hotel* is that virtually all Takings Clause claimants are denied any opportunity to present their federal constitutional claims in federal court. That result is unlikely to have been contemplated by the Court when it issued its *Williamson County* decision.

Moreover, in the 33 years since *Williamson County* was decided, the Court has repeatedly repudiated that decision's rationale even as it has given lip service to the decision itself. For example, the Court on several occasions has referred to the state-court exhaustion requirement as "prudential." But that description makes little sense if, as *Williamson County* reasoned, the requirement is based on an interpretation of the Fifth Amendment's language. If no Takings Clause violation exists until compensation has been denied in an "adequate" state-court proceeding, then *all* federal-court Takings Clause claims should be dismissed on the pleadings until after a state-court judgment has been rendered, and there are no "prudential" grounds for waiving the state-court exhaustion requirement. Indeed, *Williamson County*'s rationale should similarly bar all *state-court* Takings Clause claims, and dozens of state courts so held in response to *Williamson County*. But *San Remo Hotel* overruled all of those state-court decisions; it held that property owners could raise Takings Clause claims as part of their state-court inverse-condemnation proceedings, but it included no explanation why its holding was not wholly inconsistent with *Williamson County*'s interpretation of the Fifth Amendment. *San Remo Hotel*, 545 U.S. at 346.

The Court's failure to adhere to *Williamson County*'s rationale in later decisions is a strong indication—along with the absence of any pre-1985 precedent supporting the decision—that *Williamson County* was wrongly decided. The Court should overrule *Williamson County*'s state-court exhaustion requirement and reverse the dismissal of Knick's federal-court Takings Clause claims.

If the Court is reluctant to abandon that requirement altogether, alternative grounds exist for ruling in Knick's favor. *Amici* urge the Court, as an alternative basis for reversing the Third Circuit, to rule that the state-court exhaustion requirement is inapplicable when the defendant is a local government and to defer to another day the issue of whether to overrule *Williamson County* when the defendant is a State.

Several rationales support that alternative holding. First, state courts and a state executive-branch agency are both components of a State's government. So when the latter denies a just-compensation claim, the denial is at least arguably non-final so long as the decision is subject to revision by another component of the same government. But local governments, while they may be established by and subservient to the State, are distinct entities. A local government's denial of a just-compensation claim cannot plausibly be classified as anything other than a final decision when it provides no forum of its own within which to appeal the denial. Nothing in the text of the Takings Clause suggests that the courts of a State, and not those of the federal government, are the appropriate forums for resolving Fifth Amendment claims filed against a local government.

Second, Eleventh Amendment considerations merit careful review when deciding whether to sanction federal-court Takings Clause claims against state governments. The Court has never addressed whether the Eleventh Amendment grants States immunity from federal-court suits raising claims under the Takings Clause. Lower-court decisions and legal scholarship suggest that the issue is a close one. But there is no doubt that local governments such as Scott Township are *not* entitled to any Eleventh Amendment immunity. So there can be no federalism-based objections to a ruling that overturns *Williamson County*'s state-court exhaustion requirement with respect to claims filed against local governments.

ARGUMENT

I. THE COURT SHOULD OVERRULE *WILLIAMSON COUNTY*'S STATE-COURT EXHAUSTION REQUIREMENT

Williamson County's adoption of a state-court exhaustion requirement was based on a misinterpretation of the Fifth Amendment, is inconsistent with both previous and subsequent Court decisions, and has created undue hardship for litigants seeking compensation under the Takings Clause. It ought to be overruled.

Amici note that *Williamson County*'s recognition of a state-court exhaustion requirement was at most an alternative basis for its decision to overturn a Takings Clause judgment entered against a Tennessee county. The Court initially determined that a property owner's constitutional challenge to the county's land-use regulations was not yet ripe for review because the county had not made "a final decision regarding the application of [the] regulations to the property at issue." 473 U.S. at 187. The Court noted that the owner had not yet sought any variances from the land-use regulations; while the county had disapproved one preliminary development plan based on those regulations, the Court concluded that the disapproval should not be deemed final given the very real possibility that variance requests would be granted—thereby permitting development to proceed. *Id.* at 193-94. Only after determining that the county's land-use decision was insufficiently final to permit a Takings Clause challenge did the Court turn to the issue of a state-court exhaustion requirement.

The Court's analysis of that issue focused on the Takings Clause's "just compensation" language. It initially observed, "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194. The Court held that a local government, even if its interference with property-development plans constitutes a taking of the property, cannot be deemed to have denied the requisite just compensation unless the property owner is unable to obtain that compensation in inverse-condemnation proceedings initiated in state court. *Id.* at 194-95. Although resort to state-court proceedings would likely delay compensation payments for a number of years, the Court concluded that such delays did not amount to a constitutional violation because the Fifth Amendment does not

> require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just

> compensation, then *the property owner has no claim against the Government for a taking.*

Ibid (emphasis added and citations omitted). The Court concluded that the takings claim was premature because the property owner had "not shown that the [Tennessee state-court] inverse condemnation procedure is unavailable or inadequate" and had not utilized that procedure. *Id.* at 197.

A. *Williamson County* Was Premised on a Misreading of the Fifth Amendment's "Just Compensation" Requirement

The linchpin of *Williamson County*'s adoption of a state-court exhaustion requirement was its conclusion that the Fifth Amendment does not require "contemporaneous" payment of just compensation for a taking and thus that *no violation occurs* even if compensation is delayed until after a property owner has initiated and completed a state-court inverse condemnation proceeding. That conclusion is at odds with the plain language of the Takings Clause.

The Fifth Amendment states, "Nor shall private property be taken for public use, without just compensation." The most natural reading of that language is that a taking is prohibited unless the government contemporaneously pays just compensation; one would not normally refer to a taking being undertaken "with" just compensation unless the payment is made at the time of the taking. *See, e.g., Webster's New Collegiate Dictionary* (G. & C. Merriam

Co. 1981) ("with" is "used as a function word to indicate combination, accompaniment, or addition"); *Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409, 1410 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of *certiorari*) (stating that the Takings Clause "is most naturally read to mean that compensation must accompany the taking, and not that the claimant shall have the opportunity to ask for the compensation remedy in a post-taking court action") (citation omitted).

The Court never held otherwise prior to *Williamson County*. The Court later examined the history of just-compensation proceedings (both under the Takings Clause and the common law) in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 528 U.S. 687 (1999). It concluded that common-law inverse-condemnation claims were classified by 18th and 19th-century American courts as tort actions, in which a property owner sought damages for trespass. 528 U.S. at 715. The implication is clear: requiring a landowner whose property has been taken to resort to an inverse-condemnation proceeding to obtain just compensation was viewed as a legal wrong—not simply an orderly procedure for determining the requisite compensation.

Indeed, the 19th-century decision principally relied on by *Del Monte Dunes* for its characterization of inverse-condemnation claims, *Gardner v. Village of Newburgh*, 2 Johns.Ch. 162 (N.Y. 1816) (Kent, Ch.), held explicitly that the common law requires the government to pay contemporaneously whenever it takes private property for a public use. The defendant in *Gardner* (a local government), in an effort to create a source of public drinking water, diverted water that normally passed through property owned by the plaintiff, who used the water for irrigation and to operate a mill. Because the government failed to compensate the landowner for this interference with his riparian rights, Chancellor James Kent issued an injunction against the water diversion. Kent held that governments are entitled to take property for a public purpose, but only if contemporaneous payment is made: "But to render the exercise of the power valid, a fair compensation *must, in all cases, be previously made* to the individuals affected, under some equitable assessment to be provided by law." *Id.* at 166 (emphasis added). *See also Horne II*, 135 S. Ct. at 2426 (quoting Magna Carta's provision prohibiting any government official from "taking 'corn or other provisions from any one without *immediately* tendering money therefor, unless he can have postponement thereof by permission of the seller'") (emphasis added).

Of course, a property owner who has suffered a taking has no need to file an inverse-condemnation action in state court unless she has been told by government officials that she will not receive the compensation to which she believes herself entitled. Once she files the inverse-condemnation action in state court and demands compensation, the government answers by reiterating its denial that compensation is due. Yet despite that express denial, *Williamson County* holds that no Fifth Amendment violation occurs unless and until the state court—years later—rules against the property owner.[2] According to *Williamson County*, "no" does not mean "no" unless a state court agrees years later with the government's answer. That holding cannot be squared with the plain language of the Fifth Amendment.

Moreover, the state-court exhaustion requirement is unique to claims filed under the Takings Clause. Civil litigants asserting violation of their rights under other constitutional provisions are permitted to file suit in federal court without first bringing their claims before a state court—even though the *Williamson County* rationale could logically be applied to their claims. For example, an applicant for financial benefits from a local government may have been denied the benefits on the basis of her race or gender. Applying *Williamson County*'s rationale, the local government could argue that the unsuccessful applicant should be relegated to state court because there would be no equal-protection violation if the state court awards her all requested benefits. But of course, courts have never so held; they routinely recognize the right to file a federal-court claim for damages under 42 U.S.C. § 1983 for violations of the Fourteenth Amendment's Equal Protection Clause. *See. e.g.*, *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246 (2009). Nothing in the Fifth Amendment's language supports denying the same right to Takings Clause claimants.

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[2] If the property owner ultimately prevails in state court and is awarded her requested compensation, *Williamson County* holds that the government has satisfied its Fifth Amendment obligations and no constitutional violation has occurred. 473 U.S. at 194-95.

B. Prior Decisions on which *Williamson County* Purported to Rely Do not Support the Court's Holding

Williamson County cited several of the Court's prior decisions in support of its interpretation of the Takings Clause. None of the cited cases support *Williamson County*'s no-need-for-contemporaneous-compensation holding.

The Court relied principally on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), a case in which a pesticide manufacturer sued for injunctive and declaratory relief, alleging that the federal government had taken its intellectual property without providing just compensation. According to *Williamson County*, the Court held in *Ruckelshaus* that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491." 473 U.S. at 195. That statement mischaracterizes *Ruckelshaus*, which quite clearly did *not* hold that the manufacturer's takings claims were "premature." Rather, it simply held that the manufacturer had filed suit in the wrong federal court: instead of filing suit in federal district court for injunctive and declaratory relief, the manufacturer should have filed suit in the Court of Federal Claims for damages, as specified by the Tucker Act. *Ruckelshaus*, 467 U.S. at 1016-19.

Williamson County's reference to "the process provided by the Tucker Act" suggests that the referenced Tucker Act "process" is something other than a Takings Clause claim. That suggestion is incorrect. Indeed, the Tucker Act creates no causes of action; it is a jurisdictional statute that grants the Court of Federal Claims exclusive jurisdiction for "any claims against the United States founded ... upon the Constitution" in excess of $10,000. 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1346(a)(2). It is well accepted that "[a] Fifth Amendment takings claim falls within the Tucker Act's grant of jurisdiction because it is a claim against the United States founded upon the Constitution." *Acceptance Ins. Cos. v. United States*, 503 F.3d 1328 (Fed. Cir. 2007). So by holding that the plaintiff was required to file his damages claim in the Court of Federal Claims under the Tucker Act, *Ruckelshaus* was not suggesting that the plaintiff's Takings Clause claim was "premature" until after it had availed itself of "the process provided by the Tucker Act."[3]

All but one of the other decisions relied on by *Williamson County* also involved claims filed against the federal government. Each simply affirmed that Takings Clause claims should be filed in the Court of Federal Claims and never suggested that such claims were premature until "the process provided by the Tucker Act" had been completed.

Williamson County cited one of those cases, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974), for the proposition that the Takings Clause does not "require that just compensation be paid ... contemporaneously with the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." 473 U.S. at 194. *Regional Rail* held no such thing. At issue in the case was whether a 1973 federal statute adopted to assist in the reorganization of bankrupt Northeast railroads (the "Rail Act") had withdrawn Tucker Act jurisdiction over Takings Clause claims. The Court held that the Rail Act had not withdrawn Tucker Act jurisdiction, and thus that the Court of Claims possessed jurisdiction to hear any just-compensation claims that railroad creditors might raise if they later concluded that the Rail Act effected a taking of their property. 419 U.S. at 125-136, 148.

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[3] *Ruckelshaus* also stated, "The Fifth Amendment does not require that compensation precede the taking." 467 U.S. at 1016 (citing *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932)). But it never stated that the Fifth Amendment does not require the *contemporaneous* payment of just compensation.

Regional Rail did not state that the federal government would remain in compliance with the Takings Clause even if it delayed paying just compensation after taking private property. To the contrary, the Court held that the Court of Claims would have jurisdiction under the Tucker Act to hear a Takings Clause claim as soon as an uncompensated taking of private property was alleged. While acknowledging that a final adjudication of whether an uncompensated taking had occurred would be delayed while Court of Claims proceedings continued, the Court noted that "[i]nterest on a just-compensation award runs from the date of the taking"—thereby recognizing that the constitutional violation is complete as soon as the government takes private property yet fails to provide just compensation. *Id.* at 148 n.35.

The only other case relied on by *Williamson County* for its state-court exhaustion requirement did not even involve the Takings Clause. *Parratt v. Taylor*, 451 U.S. 527 (1981), involved a due-process claim raised by a prisoner whose hobby kit was lost due to the alleged negligence of state prison officials. 473 U.S. at 195 & n.14. The Court concluded in *Parratt* that prison officials did not violate the plaintiff's constitutional rights by failing to provide him with pre-deprivation "process"—noting the obvious difficulty in providing a hearing prior to depriving the prisoner of his property when the defendants never intended to lose the hobby kit. The Court held that prison officials satisfied the prisoner's due process rights by providing him with an opportunity for a post-deprivation hearing. 451 U.S. at 543-44. That holding is far afield from *Williamson County*; the issue in *Parratt* had nothing to do with a prisoner's right to compensation for property taken by prison officials—a right that prison officials never denied.

C. *Williamson County* Creates Undue Hardship for Property Owners Asserting Takings Clause Claims

Overruling *Williamson County's* state-court exhaustion requirement is warranted for the additional reason that it creates undue hardship for property owners asserting Takings Clause claims. Those hardships are well-illustrated by the Court's decision in *San Remo Hotel*; instead of ripening Takings Clause claims for later assertion in federal court (the Court's stated intention in creating a state-court exhaustion requirement), the effect of the requirement is to ensure that Takings Clause claims can virtually *never* be heard in federal court.[4]

San Remo Hotel involved a California property owner who sought to assert as-applied Takings Clause claims in federal court against a California city whose regulations significantly restricted permissible uses of the property. The Ninth Circuit dismissed the claim as unripe, holding that *Williamson County* required the property owner first to seek relief in California state court. The property owner complied, filing an inverse condemnation lawsuit alleging violation of California law—but not any constitutional claims, because California courts deemed Takings Clause claims unripe until after a property owner had exhausted state-law remedies.[5] After fully complying with *Williamson County* by exhausting his state-court remedies (the California courts denied compensation), the property owner returned to federal court to pursue his Takings

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[4] The hardship for property owners is reduced considerably if the government concedes that a taking has occurred and files a condemnation action in state court. Under those circumstances, the property owner is relieved of the burden of initiating litigation, and the only contested issue left for decision is the amount of compensation to be paid. *See Del Monte Dunes*, 526 U.S. at 711-12 (cataloging the "important legal and practical differences between an inverse condemnation suit and a condemnation proceeding"). If the Court is reluctant to overrule *Williamson County's* state-court exhaustion requirement in its entirety, it may wish to consider ruling, in the alternative, that the requirement should remain in place only when the government has filed a condemnation proceeding in state court. Scott Township has not, of course, initiated any such proceeding with respect to its taking of Knick's property.

[5] *Breneric Associates v. City of Del Mar*, 9 Cal. App. 4th 166, 188 (1998) (citing *Williamson County*).

Clause claims. But this Court ruled unanimously that preclusion rules now barred the property owner from asserting those claims. *San Remo Hotel*, 545 U.S. at 336-48.

The combined effect of *Williamson County* and *San Remo Hotel* was to deny the property owner *any* opportunity to raise his substantial Takings Clause claims, whether in federal court *or* in state court. Thus, a rule initially created in *Williamson County* for the purpose of requiring Takings Clause claims to be ripened before being asserted in federal court has transmogrified into a rule that precludes federal-court consideration of such claims—and in some instances, as in *San Remo Hotel*, precludes *all* consideration.

The effective ban on federal-court review of Takings Clause claims undercuts one of Congress's central purposes in adopting 42 U.S.C. § 1983, which creates a cause of action against state actors for violating federal constitutional rights:

> It is abundantly clear that one reason [42 U.S.C. § 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled in part on other grounds, Monell v. New York City Dep't of*

Social Servs., 436 U.S. 658 (1978).

Indeed, four justices who concurred in *San Remo Hotel* nonetheless recognized the unfairness of a rule that "all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." *San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring, joined by O'Connor, Kennedy, & Thomas, JJ.). The justices stated that ***Williamson County's*** impact on takings plaintiffs was "dramatic" and that its justifications were "suspect"; they urged that the state-court exhaustion requirement be reconsidered. *Id.* at 352. The undue burdens imposed on litigants by *Williamson County* provide ample justification for overturning a precedent that has not withstood the test of time.

D. Subsequent Court Decisions Have Largely Abandoned the Rationale Underlying *Williamson County*

Williamson County adopted its state-court exhaustion requirement based on its understanding of the meaning of the Fifth Amendment. The Court interpreted the Takings Clause as imposing no requirement that just compensation be paid *contemporaneously* with the taking of private property; no constitutional violation occurs even if the government delays for years following the taking before making its final decision to pay compensation. Later Court decisions have largely abandoned that understanding of the Fifth Amendment. In light of that abandonment, *stare decisis* considerations should carry little or no weight in the decision whether to overrule *Williamson County.*

Less than two years following its decision in *Williamson County,* the Court addressed whether litigants were entitled to recover monetary damages for temporary "regulatory" takings—those regulatory takings that are ultimately invalidated by the courts. The Court determined that such damages are recoverable, even when the government decides to discontinue its regulations to avoid being forced to pay for a permanent taking of the regulated property. *First English Evangelical Lutheran Church of Glendale v. City of Los Angeles,* 482 U.S. 304, 322 (1987). Although the Court sought to distinguish *Williamson County,* 482 U.S. at 321,the two decisions are in considerable tension.

First English was premised on a conclusion that awarding damages for a temporary taking is constitutionally required because it is unfair to property owners to deny them both compensation and the use of their property during the years (following a taking) often required to litigate contested takings claims. *Id.* at 318-19. But if, as *Williamson County* held, no Fifth Amendment violation can come into existence until a state court denies a just-compensation claim, *First English*'s unfairness rationale is substantially undercut. *Williamson County* suggests that the time necessary to resolve inverse-condemnation proceedings in a state court is part of the delay inherent in the "normal" process undertaken by governments in determining whether to approve property-development plans. *First English,* 482 U.S. at 334-35 & n.12 (Stevens, J., dissenting) (citing *Williamson County*).

Williamson County's rationale is also called into question by the numerous decisions that have referred to the state-court exhaustion requirement as "prudential" in nature. *See, e.g.*. *Suitam v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997). In *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 729 (2010), the Court said that the requirement is not "jurisdictional" and thus was waived by Florida officials when they failed to raise it explicitly in their opposition to the certiorari petition. But describing the requirement to exhaust remedies by seeking just compensation in "adequate" state-court proceedings as "prudential" and not "jurisdictional" suggests that the Court now views it as a mere procedural requirement rather than, as *Williamson County* held, a required element of a Takings Clause claim.

Florida asserted at all stages of the *Stop the Beach Renourishment* litigation (including in its opposition to the certiorari petition) that its activities did not constitute an uncompensated taking of the plaintiffs' property. The Court addressed the merits of that issue and agreed with Florida that no Takings Clause violation had occurred. 560 U.S. at 729-33. Had the Court concluded that Florida's failure-to-exhaust-state-court-remedies argument was part and parcel of its no-Takings-Clause-violation argument (a conclusion it would have reached had it adhered to *Williamson County's* interpretation of the Fifth Amendment), it would have had no basis for concluding that Florida waived its *Williamson County* failure-to-exhaust argument.

That the Court now views *Williamson County* as imposing merely a procedural requirement is also supported by its *San Remo Hotel* decision. In the years following the *Williamson County* decision, most of the state courts that addressed the issue concluded that property owners could not raise Takings Clause claims as part of a state-court inverse-condemnation proceeding. They very reasonably concluded that if, as *Williamson County* held, no Fifth Amendment violation can exist until after "adequate" state-court just-compensation proceedings are completed, then pre-exhaustion Takings Clause claims are no more actionable in state court then they are in federal court. *See, e.g., Breneric Associates v. City of Del Mar*, 69 Cal. App. 4th 166, 188 (1998); *Droste v. Bd. of County Comm'rs*, 85 P.3d 585, 591 (Colo. App. 2003); *Milillo v. City of New Haven*, 249 Conn. 138, 154 n.28 (1999); *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 262-64 (Iowa 2001); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 n.2 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999); *Levatte v. City of Wichita Falls*, 144 S.W.3d 218, 224 (Tex. App. 2004); *Sintra v. City of Seattle*, 119 Wn.2d 1, 20 (1992); *Eberle v. Dane County Bd. of Adjustment*, 227 Wis.2d 609, 638-39 (1999).

San Remo Hotel overturned that case law, perhaps concerned that those decisions—when combined with *Williamson County* and issue-preclusion principles—effectively barred most property owners from *ever* raising Takings Clause claims. 545 U.S. at 346 ("Reading *Williamson County* to preclude plaintiffs [in state-court inverse-condemnation proceedings] from raising [Takings Clause] claims in the alternative would erroneously interpret our cases as requiring property owners to resort to piecemeal litigation or otherwise unfair procedures.") (citation omitted). Of course, the very same criticism could be leveled at *Williamson County*'s state-court exhaustion requirement. More importantly, *San Remo Hotel*'s holding that *Williamson County* does not command state courts themselves to impose the state-court exhaustion requirement suggests that the Court no longer adheres to *Williamson County*'s interpretation of the Fifth Amendment. As the concurring justices pointed out, *Williamson County* can be understood not to impose such a command "only if *Williamson County*'s state-litigation requirement is merely a prudential rule, and not a constitutional mandate." *San Remo Hotel*, 545 U.S. at 351 n.2 (Rehnquist, C.J., concurring).

If *Williamson County* is a prudential rule, it is in considerable tension with the principle, long recognized by this Court, that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*,134 S. Ct. 1377, 1386 (2014). The Takings Clause claims of Petitioner Knick and similarly situated property owners fall within the Article III jurisdiction of the federal courts. *Horne v. Dep't of Agriculture* ["*Horne I*"], 569 U.S. 513, 526 & n.6 (2013). Yet *Williamson County* provided no prudential rationale for imposing a state-court exhaustion requirement on Takings Clause claimants while imposing no similar obstacles in the path of those asserting other constitutional rights.

In *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), the Court articulated a prudential ripeness rationale for deferring federal-court review of some federal-law challenges to the actions of government agencies.[6] But *Abbott Labs* stressed that its prudential ripeness doctrine was limited to lawsuits seeking injunctive or declaratory relief; that doctrine can justify deferred adjudication of federal claims only because "[t]he injunctive and declaratory remedies are discretionary." 387 U.S. at 148. The Court has never invoked prudential ripeness to deny federal-court access to litigants who possess Article III standing and assert claims for monetary damages.

In sum, the Court's post-*Williamson County* case law has largely abandoned that decision's rationale for adopting a state-court exhaustion requirement and has re-characterized the requirement as a "prudential" ripeness doctrine. Moreover, the Court has never attempted to explain the rationale for a prudential rule that is inconsistent with the longstanding doctrine requiring federal courts to hear and decide cases coming within their jurisdiction. The absence of any coherent rationale for adhering to *Williamson County* is yet another reason to overturn that decision and permit Petitioner to assert her Fifth Amendment claims in federal court.

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[6] In determining prudential ripeness, federal courts are directed to evaluate both "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs*, 387 U.S. at 149.

II. ALTERNATIVELY, THE COURT SHOULD OVERRULE *WILLIAMSON COUNTY* WITH RESPECT TO CLAIMS FILED AGAINST LOCAL GOVERNMENTS

If the Court is reluctant to abandon the state-court exhaustion requirement altogether, alternative grounds exist for ruling in Knick's favor. *Amici* urge the Court, as an alternative basis for reversing the Third Circuit, to rule that the state-court exhaustion requirement is inapplicable when the defendant is not a State. Whatever justifications may exist for upholding the requirement with respect to a State defendant, those justifications are inapplicable to Scott Township and the many other Takings Clause defendants that are not States.

A. Unlike States, Local Governments Do not Provide Their Own Forums within which Property Owners Can Assert Inverse Condemnation Claims

Williamson County premised its state-court exhaustion requirement on an understanding that a government should not be deemed to have issued a "final" denial of a just-compensation request until all branches of that government have signed off on the denial. 473 U.S. at 194-95. If the executive branch of a State denies a property owner's request for just compensation for an alleged taking, it is arguable that the State has not yet denied the request if it provides a judicial forum within which the owner can re-assert that claim.

But that argument is inapplicable to Knick's claims against Scott Township. Despite Knick's protests that the township is violating her Fifth Amendment rights, it has served her with two Notices of Violation directing her to make access to her property "available to the public." Pet. App. 5-A. Scott Township has not established any forum within which Knick could assert either that its actions constituted a taking or that she is entitled to just compensation. Scott Township asserts that Knick should be required to raise her federal constitutional claims in a forum created by the Commonwealth of Pennsylvania rather than a forum created by the federal government, but it has provided no coherent rationale regarding why the Fifth Amendment requires that its choice of forums should take precedence over Knick's. And the fact that Pennsylvania has made available a forum in which Knick may assert a reverse condemnation claim does not make the actions of Scott Township any less final.

Scott Township apparently premises its *Williamson County* defense on its contention that it should be considered the same entity as the Commonwealth of Pennsylvania and thus that Pennsylvania's decision to permit Knick to seek redress in its Court should be attributed to Scott Township itself. That contention has never been accepted by this Court. In a wide variety of cases, the Court has treated state and local entities as distinct entities. *See, e.g., City of Columbus v. Ours Garage and Wrecker Services, Inc.*, 536 U.S. 424 (2002) (treating state governments and local governments as separate entities for purposes of determining whether federal law preempts government regulation of towing services); *Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (state governments generally are not liable for the financial obligations of local governments). While it is true that local governments are established by and subservient to state governments, those facts do not negate their status as distinct entities. Because Scott Township is not the entity that has provided a state-court forum for the adjudication of Knick's Fifth Amendment claims, it cannot plausibly allege that it has not yet rejected those claims. The Court should reverse the Third Circuit's dismissal of those claims regardless whether state-court exhaustion is properly required for Taking Clause claims filed against *States* that authorize the filing of inverse-condemnation claims in their own courts.

B. Unlike Proceedings Against States, Proceedings Against Local Governments Raise No Eleventh Amendment Concerns

The filing of damages claims against local governments in federal court raises none of the federalism concerns that arise from similar lawsuits filed against States. The Court has repeatedly held that the States' Eleventh Amendment immunity from federal-court litigation does not extend to local governments. *See. e.g., Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 280 (1977). Eleventh Amendment issues are thus irrelevant to whether the Court should overturn *Williamson County* as it applies to Takings Clause claims filed against local governments.

The Court has never addressed the applicability of Eleventh Amendment immunity to Takings Clause claims filed against States. Substantial scholarship supports the view that the Eleventh Amendment is inapplicable to such claims. *See, e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493 (2006); Note, *Reconciling State Sovereign Immunity with the Fourteenth Amendment*, 129 HARV. L. REV. 1068 (2016). Proponents of the Eleventh-Amendment-is-inapplicable viewpoint cite *First English*, in which the Court noted the Takings Clause's "self-executing character" and stated that "in the event of a taking, the compensation remedy is required by the Constitution." 482 U.S. at 315-16. Because the Fourteenth Amendment made the Fifth Amendment applicable to the States, *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897), there is considerable force to the argument that the Fourteenth Amendment abrogated States' Eleventh Amendment immunity from Takings Clause claims.

Moreover, this Court has frequently adjudicated Takings Clause claims asserted against state governments, without commenting on any Eleventh Amendment implications of its assertion of jurisdiction. Such instances include cases that were initially heard in federal court—*Williamson County* did not bar federal court review in those case because an adequate state-court remedy did not exist. *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).[7] Other instances include cases in which the Court reviewed state supreme court decisions that rejected a landowner's Takings Clause claims against a State,[8] even though the Court's leading Eleventh Amendment decision regarding appellate review limited its approval of appellate review of state-court decisions in which a State prevailed in the court below to cases in which the State initiated the litigation. *Cohens v. Virginia*, 19 U.S. 264, 405-12 (1821). Indeed, in an area of the law closely analogous to Takings Clause claims—due-process lawsuits against States for a refund of taxes paid under protest—the Court has explicitly held that the Eleventh Amendment does not bar the Court from reviewing state-court decisions that reject a tax refund claim. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26-31 (1990).

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[7] In *Phillips*, the lower federal courts rejected efforts by the State of Texas to invoke Eleventh Amendment immunity.

Nonetheless, the issue of whether States may assert Eleventh Amendment immunity from federal-court Takings Clause lawsuits is far from clear. At least three federal appellate courts have held that the Eleventh Amendment bars Takings Clause claims filed against a State in federal court, at least where the State's courts are open and available to hear such claims. *Hutto v. South Carolina Retirement System*, 773 F.3d 536 (4th Cir. 2014); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954-56 (9th Cir. 2008); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526-28 (6th Cir. 2004).

The Court need not, of course, reach the Eleventh Amendment issue. For the reasons explained in Section I of this brief, it should overrule *Williamson County*, reverse the lower courts' dismissal of Knick's lawsuit, and remand the suit for further proceedings. Because Scott Township is not a State, the Eleventh Amendment will play no part in the remanded proceedings. Even if the Court is concerned by the Eleventh Amendment implications of overruling *Williamson County*, it can appropriately defer any consideration of those implications until it is faced with a Takings Clause case in which the plaintiff asserts monetary claims against a State. Overruling *Williamson County* will do nothing to undermine the Eleventh Amendment immunity to which a State might otherwise be entitled.

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[8] *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 482 U.S. 825 (1987).

But if, due to Eleventh Amendment concerns, the Court is nonetheless reluctant to overturn *Williamson County* entirely, *amici* urge the Court, as an alternative basis for reversing the Third Circuit, to rule that the state-court exhaustion requirement is inapplicable when the defendant is a local government and to defer to another day the issue of whether to overrule *Williamson County* when the defendant is a State. Whatever relevance the Eleventh Amendment may have to Takings Clause claims filed against a State, it has no relevance to claims filed against local governments such as Scott Township. Limiting the overruling of *Williamson County* to claims filed against local governments would allow the Court await the arrival of a case involving Takings Clause claims against a State before determining the proper procedures for handling such claims.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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June 1, 2018